No. 74-1106

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

GREGORY V. WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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CITATIONS

Cases:

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-16a) is reported at 328 A.2d 98. The oral opinion of the superior court (App. C, *infra*, pp. 19a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 17a-18a) was entered on November 6, 1974. On January 28, 1975, the Chief Justice extended the time within which to file a petition for

a writ of certiorari to and including March 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness is entitled to be warned prior to testifying that he is suspected of having committed the substantive offense.

2. Whether, if a warning of some sort is required, it must be administered outside the presence of the grand jury.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

On the night of December 3, 1972, an officer of the Washington, D.C. police department stopped a van after observing it make a U-turn (Tr. 27).[1] The officer then spotted a motorcycle in the back of the van that was listed as having been recently stolen (Tr. 28). The two persons in the van, Samuel Zimmerman and Rueben Woodard, were thereupon arrested, and the van was impounded.

[1] "Tr." refers to the one-volume transcript of the suppression hearing held on June 29, 1973.

"G. Tr." refers to the transcript of respondent's grand jury testimony, a copy of which has been lodged with the Clerk of this Court.

After ascertaining that respondent owned the van, an investigative officer notified respondent that the van was in the possession of the police department (Tr. 8, 29). Respondent then went to the police department to recover it. He told the police officer on duty that he would not press charges against Zimmerman and Woodard because they were friends of his and had had permission to use the van. He explained the presence of the motorcycle by relating that, while driving his van on the evening in question, he had stopped to offer assistance to a person whose motorcycle had broken down. Shortly after loading the motorcycle in the back of the van, however, the van itself broke down. Respondent then left the owner of the motorcycle with the van and called upon his friends Zimmerman and Woodard to help him (Tr. 12, 16). When he returned to the van, the motorcycle's owner had disappeared, leaving the motorcycle behind. The officer to whom respondent related this story said that he did not believe respondent and would not release the van (Tr. 23).

Respondent then went to the United States Attorney's office to make arrangement for its release (Tr. 36). The Assistant United States Attorney to whom respondent talked similarly did not believe his explanation and, although releasing the van, gave respondent a subpoena to appear before the grand jury (Tr. 37-38, 42).

Respondent appeared before the grand jury on February 5, 1973. Prior to questioning, he was warned as follows (G. Tr. 3-4):

Q. Before I ask you any questions I have to tell you what your rights are. I'd like you to listen carefully and I'm going to ask you some questions about your rights afterwards.

You are not under arrest. You're just here by way of subpoena.

Before I, or anybody else in the Grand Jury, ask you any questions you must understand what your rights are.

You have a right to remain silent. You are not required to say anything to us in this Grand Jury at any time or to answer any questions.

Anything you say can be used against you in Court.

You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.

If you cannot afford a lawyer and want one a lawyer will be provided for you.

If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.

You also have the right to stop answering at any time until you talk to a lawyer.

Now, do you understand those rights, sir?

A. Yes, I do.

Q. And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?

A. Yes, sir

Q. And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

A. No, I don't think so.

Respondent was then shown a form containing *Miranda* warnings and an agreement to waive the Fifth Amendment privilege. He read the form and then signed the waiver (G. Tr. 3-4).[2] Respondent was then questioned about his knowledge of the motorcycle theft. He related in detail the same story he had told the authorities twice before (G. Tr. 4-28).

The grand jury thereafter indicted respondent, Zimmerman and Woodard for grand larceny (22 D.C. Code 2201) and receiving stolen property (22 D.C. Code 2205).

2. Respondent moved to quash the indictment on the ground that it was based on grand jury testimony that had been obtained in violation of his Fifth Amendment rights. After a suppression hearing, the Superior Court for the District of Columbia held that the warnings given respondent were inadequate (App. C, *infra*, p. 19a) in that, because respondent was a suspect when he appeared before the grand jury, an inquiry should have been made "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences

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[2] This was the same form used by the Metropolitan Police Department prior to custodial questioning (Tr. 62).

of what might result in the event that he does waive his constitutional right and in the event that he does make incriminating statements" (App. C, *infra*, p. 20a). Respondent should have been warned, according to the court, that his testimony could result in his indictment by the grand jury before which he was testifying, that thereafter he could be required to stand trial in a criminal court on prosecution for a criminal offense, and that statements made before the grand jury could be used against him at such trial (App. C, *infra*, p. 20a). The superior court therefore suppressed respondent's grand jury testimony and dismissed the indictment against him.

The District of Columbia Court of Appeals sustained the suppression order of the superior court but reversed the dismissal of the indictment (App. A, *infra*, p. 13a). As reasons for sustaining the suppression order, the court pointed to the fact that the prosecutor had failed to inform respondent that he was a potential defendant when he appeared before the grand jury (App. A, *infra*, p. 3a) and had waited "until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given" (*ibid.*).

REASONS FOR GRANTING THE WRIT

This case presents a question closely related to those that underlie our pending petitions for certiorari to review the decisions of the Ninth Circuit in *United States* v. *Wong*, No. 74-1636, decided September 23, 1974 (Sup. Ct. No. 74-635), and the Fifth

Circuit in *United States* v. *Mandujano*, 496 F.2d 1050 (Sup. Ct. No. 74-754), and over which the circuits are in conflict: the extent to which (if at all) a grand jury witness suspected of involvement in criminal activity must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination.[3] Here, in providing respondent with complete *Miranda* warnings prior to questioning him, the prosecutor took all the precautions required by *Mandujano* and *Wong* to assure voluntariness—precautions which, we submit, are not constitutionally required. Nevertheless, the District of Columbia Court of Appeals ruled that the respondent's subsequent testimony should be suppressed because the prosecution failed to provide him with two additional constitutional entitlements: (1) a warning that he was a "putative defendant" whom the grand jury might indict; and (2) administration of these warnings outside the presence of the grand jury.[4]

In requiring that a so-called "putative defendant" be given, outside the presence of the grand jury, complete *Miranda* warnings *plus* a warning that he is considered to be a potential defendant, the court in the instant case unjustifiably impeded the investigative power of the grand jury, which "must be broad if its public responsibility is adequately to be dis-

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[3] We are sending copies of our petitions in *Wong* and *Mandujano* to counsel for respondent.

[4] As the court made clear, its holding was based on federal grounds, not on local evidentiary law (App. A, *infra*, p. 6a): "[A]ppellee's testimony before the grand jury was tainted for it is the immediate product of *constitutional* violation" (emphasis supplied).

charged." *United States* v. *Calandra*, 414 U.S. 338, 344. It also adopted an unduly expansive notion of the content of the self-incrimination provision of the Fifth Amendment, which does not require the giving of a warning appropriate to police interrogation in the grand jury context and does not, any more than *Miranda* itself, require telling a "putative defendant" that he is suspected of committing the substantive offense. The decision subverts the policy of the Fifth Amendment against compulsion and transmutes it into a general policy to discourage admissions or statements of any kind to grand juries.

1. Although there is considerable overlap between this case, on the one hand, and *Mandujano* and *Wong*, on the other, there are also significant differences that make it important for this Court to review the decision in this case in order to resolve the burgeoning uncertainties that surround the question of the responsibilities of the government in providing warnings to grand jury witnesses and the consequences of any failure by the government to comply with such requirements as may be recognized. Both *Mandujano* and *Wong* were perjury prosecutions, and the resolution of those cases might well turn on special policies applicable to that crime. See *United States* v. *Knox*, 396 U.S. 77; *Bryson* v. *United States*, 396 U.S. 64; *Glickstein* v. *United States*, 222 U.S. 139. Respondent has not been accused of perjury, so that suppression of his testimony in a prosecution for the substantive offense to which it related is a more

appropriate remedy (*if* that testimony was obtained in violation of his privilege against compelled self-incrimination). The instant case also usefully complements *Mandujano* and *Wong* in that, as outlined above, it imposes significant additional requirements on the government.

2. Whatever may be the desirable practice, we do not believe that a grand jury witness—even a so-called "putative defendant"—is *constitutionally* entitled to be apprised of his privilege against self-incrimination, let alone to receive complete *Miranda* warnings.[5] The reasons for this position are set forth in our petition in *Mandujano* (Pet. No. 74-754, pp. 8-12) and will not be reiterated here.

Even if our position on that question is rejected, the decision in the instant case goes far further—and with even less justification—by holding *Miranda*-type warnings insufficient and requiring an additional warning of the witness's status as a potential defendant. This requirement is far removed from the governmental obligation under the self-incrimination clause of the Fifth Amendment to guard against compulsion of self-incriminating statements. Clearly, a grand jury setting is no *more* coercive than police custody, where no such additional warning is re-

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[5] It is our view that the warnings given to respondent prior to his testimony (see pp. 4-5, *supra*) reflected an inappropriate overstatement of his rights insofar as he was told he had an absolute right to remain silent as to any and all grand jury questions. A witness has no such right absent a proper invocation of a testimonial privilege.

quired.[6] Moreover, the requirement raises a host of problems for both prosecutors and courts because, among other things, of the difficulties of identifying who is a "putative defendant." See *United States* v. *Binder*, 453 F.2d 805 (C.A. 2), certiorari denied, 407 U.S. 920. If the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness, important testimony may be suppressed although voluntarily given, as here. Conversely, the ordinary witness given both *Miranda* warnings and a warning that he is a "putative defendant" (because of the fear that he may later be held by a court to have been a "putative defendant") may be discouraged from providing useful or needed evidence for the grand jury.

In sum, the court's blanket requirement that, prior to testifying, every "putative defendant" be given *Miranda* warnings and a warning that he is suspected of committing the substantive offense would not, we submit, assure the voluntariness of subsequent responses so much as it would tend to discourage the witness from making any responses at all and thereby deter the cooperation that is necessary for the grand jury to determine whether criminal

[6] Of those courts that have required some form of Fifth Amendment warning, none has held that a "putative defendant" is also constitutionally entitled to a warning that he is a suspect. *Mandujano, supra*, 496 F.2d at 1055, and *United States* v. *Rangel*, 496 F.2d 1059, 1062 (C.A. 5), hold that a "putative defendant" must be given *Miranda* warnings; *Wong, supra*, slip op. 4, holds that he must be given an "effective warning of the right to remain silent."

proceedings should be instituted against any person. The requirement would place an unwarranted stumbling block in the way of the grand jury's investigation, turning upon difficult forecasts about who is apt to be indicted. But as this Court stated in *Blair* v. *United States*, 250 U.S. 273, 282, "the scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."

3. Even assuming that a so-called "putative defendant" is constitutionally entitled to some Fifth Amendment warning prior to testifying before a grand jury, we find no justification (nor did the court below iterate any basis) for requiring that it be administered outside the presence of the grand jury.[7]

Such a requirement is patently unnecessary, since whatever warning is required can be as effectively administered before the grand jury immediately preceding questioning as prior to that time. Indeed, the latter warning, when the witness must actually decide whether to invoke his privilege or answer questions, is apt to be *more* effective in apprising him of his rights (assuming that such apprisal is necessary) than a warning at an earlier juncture. Moreover, the presence of 23 grand jurors may serve to assure

[7] The only other court to have considered this precise issue has held, to the contrary, that warnings need not be administered outside the presence of the grand jury. *United States* v. *Friedman*, 445 F.2d 1076 (C.A. 9), certiorari denied, *sub nom. Jacobs* v. *United States*, 404 U.S. 958.

that the warning is administered carefully, with proper attention to the witness's apparent comprehension. It may also aid the grand jury in ascertaining the voluntariness of subsequent responses and weighing them accordingly. And, as part of the record of the grand jury proceedings, the warning may be conveniently reviewed for its completeness.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1975.

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7609

UNITED STATES, APPELLANT

v.

GREGORY V. WASHINGTON, APPELLEE

Appeal from the Superior Court of the District of Columbia

(Argued April 8, 1974 Decided November 6, 1974)

Harry R. Benner, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry* and *Richard L. Beizer*, Assistant United States Attorneys, were on the brief, for appellant.

Frederick H. Weisberg for appellee.

Before Kern, Nebeker and Pair,* Associate Judges.

NEBEKER, *Associate Judge*: In this government appeal [1] from an order suppressing the accused's grand jury testimony and dismissing the indictment, we asked to hold that a valid waiver of rights was made and, in any event, that the indictment should not have been dismissed. We sustain the suppression order insofar as it has operation at a future trial.

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* Retired as of April 14, 1974.

[1] D.C. Code 1973, § 23-104(c).

which we make possible by reversing the order of dismissal.

Appellee was handed a subpoena to appear before the grand jury when he came to the office of the United States Attorney seeking a property release of his truck. The truck, described as a "van", had been impounded by police officers when it was found disabled on a street. At the time it was occupied by two other persons. The officers observed a motorcycle in the cargo area of the van. It was then learned that the motorcycle had recently been stolen. As a result, the occupants of the van were arrested and both vehicles were impounded. Ownership of the van was discovered to be in appellee. A few days later, after a message had been left at his home by an investigating officer, appellee went to the Metropolitan Police Department, Auto Theft Section, to recover his van. His explanation of how the motorcycle came to be in the van, and the van to be in the possession of its then-occupants, was that he had picked up a "hippy" who loaded the disabled cycle in the van. Later, when the van broke down and appellee went for help, the "hippy" left never to be heard from. The two who were arrested, according to appellee, were his friends who responded to his call for help. The police officers reasonably considered appellee's explanation to be so farfetched that he became a suspect. The van was not released to appellee by the Auto Theft Section, so he then went to the United States Attorney's office seeking a release. An Assistant United States Attorney likewise did not

believe appellee's explanation, and, although he did release the van, he handed appellee the subpoena believing he would not otherwise return to testify. Appellee was considered to be a potential defendant.

At no time was appellee told that he was considered a potential defendant in a prosecution connected with the theft of the motorcycle. Indeed, he was only told that he was needed as a witness in prosecuting the two who were occupants of the van at the time of its impoundment. When appellee appeared pursuant to the subpoena, he was taken before the grand jury without being apprised of his rights including the fact that he was considered a potential defendant.

In the presence of the grand jury, appellee was advised of his rights in a manner correctly characterized by the trial court judge as inadequate. The deficiency in that advice arises from failure to maintain a scrupulous concern that waiver must be knowingly and intelligently made.[2] We are in agreement with the trial court judge that the most significant failing of the prosecutor was in not advising appellant that he was a potential defendant. Another shortcoming was in the prosecutor's waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given. This manner of proceeding is specifically condemned by Standard 3.6(d) of the ABA

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[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). *Cf. Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, which states:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

The order, insofar as it suppressed appellee's grand jury testimony as trial evidence, is therefore affirmed. *Jones* v. *United States*, 119 U.S.App.D.C. 284, 290-91, 342 F.2d 863, 869-70 (1964). *See United States* v. *Luxenberg*, 374 F.2d 241, 246 (6th Cir. 1967); *cf. United States* v. *Scully*, 225 F.2d 113 (2d Cir. 1955).

There remains the question whether the effect of the suppression order goes to the validity of the grand jury proceeding and the indictment. At the end of the hearing, the trial court judge stated that he was going to examine the grand jury testimony to "determine whether or not there is sufficient evidence . . . to sustain the indictment independent of this witness' testimony." In his subsequent order, the judge held that "in the absence of this defendant's testimony . . . no competent evidence exists upon which the grand jury could rely in properly returning the trial court viewed the effect of its suppression order as, in contemplation of law, expunging appellee's testimony from the grand jury transcript thereby leaving an inadequate predicate for the indictment. We hold this view of the suppression order to be error

in light of *United States* v. *Blue*, 384 U.S. 251, 255 (1966). There the Court held:

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure. . . . Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.[3] [Footnote and citations omitted.]

[3] The fact that the prosecution in *Blue* had been ended and the accused exculpated played no part in the Court's holding "[o]n the merits of the case" (384 U.S. at 254). That factual aspect was critical to the then criminal appeals statute limiting government appeals to decisions "sustaining a motion in bar". *See United States* v. *Blue*, *supra* at 253 n.2. That fact was of jurisdictional significance only since in note 3 (*id.* at 255) the Court said, ". . . our precedents indicate this would not be a basis for abating the prosecution *pending a new indictment*, let alone barring it altogether." (Emphasis supplied.) Thus, the Court expressly went beyond the peculiar jurisdictional facts in *Blue* to make its holding cover cases where a new indictment was possible.

Of more recent date this concept of grand jury function and independence has been even more solidified. *See United States* v. *Calandra*, —— U.S. ——, 94 S.Ct. 613, 619, 623 (1974); *United States* v. *Dionisio*, 410 U.S. 1 (1973). *Calandra* reinforces *Blue* in its holding that evidence suppressible at trial may, in any event, be presented to a grand jury without fatally infecting the indictment.

We recognize that in *Blue* the grand jury was not the site of the constitutional deprivation. This fact does not appear of legal significance, for the Court also addressed that issue by a pointed and significant comment respecting "tainted evidence . . . presented to the grand jury." It was said in *Blue* that in the event such taint be found *in* the grand jury proceeding,

> our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See Costello v. United States, 350 US 359, 100 L ed 397, 76 S Ct 406; Lawn v. United States 355 US 339, 2 L ed 2d 321, 78 S Ct 311; 8 Wigmore, Evidence § 2184a, at 40 (McNaughton rev 1961). [*Id.* at 255 n.3.]

Of course, appellee's testimony before the grand jury was tainted for it is the immediate product of constitutional violation.

Appellee argues that on these facts we should apply the usual review standard when considering discretionary action of the trial court, *i.e.*, abusive exercise. He relies on two cases from this jurisdic-

tion for the proposition that dismissal of an indictment for lack of evidentiary basis is permissible, *Jones* v. *United States*, *supra*, and discretionary, *Carrado* v. *United States*, 93 U.S.App.D.C. 183, 188, 210 F.2d 712, 717 (1953).[4] We observe, first, that *Carrado* was decided in 1953 and since that time the Supreme Court has adopted in numerous cases "a very broad rule relating to the sufficiency of evidence supporting an indictment." *Coppedge* v. *United States*, 114 U.S.App.D.C. 79, 82, 311 F.2d 128, 131 (1962). As Judge (now Chief Justice) Burger observed in *Coppedge*, *Lawn* v. *United States*, 355 U.S. 339 (1958), stood for the often quoted principle that:

> "[A]n indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." [*Coppedge* v. *United States*, *supra* at 82, 311 F.2d at 131.]

Numerous decisions of the Supreme Court before and after *Lawn* attest to the proposition that this principle is not intended to be confined to the particular facts of a given case. *See United States* v. *Calandra*, *supra*; *United States* v. *Dionisio*, *supra*; *United States* v. *Blue*, *supra* at 255 n.3; *Costello* v. *United States*, 350 U.S. 359, 363 (1956); *Holt* v. *United States*,

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[4] Appellee also relies on *Truchinski* v. *United States*, 393 F.2d 627, 632 (8th Cir. 1968); *United States* v. *Tane*, 329 F.2d 848, 853 (2d. Cir. 1964).

218 U.S. 245, 248 (1910). Indeed, *Calandra* holds that "the validity of an indictment is not affected by the character of the evidence considered." *Id.* 94 S.Ct. at 618. Respecting the power of a grand jury to act, it was observed in *Dionisio* that "jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." 410 U.S. at 15.[5] *Lawn* and *Costello*, when read in light of *United States* v. *Dionisio*, *supra* at 17, also forbid "preliminary trial[s] to determine the competency *and adequacy of* the evidence before the grand jury." *Lawn* v. *United States*, *supra* at 349 (emphasis supplied).

> Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. . . . [*United States* v. *Dionisio*, *supra* at 17.]

To permit this indictment to be challenged for inadequate evidence and require the grand jury to recon-

[5] We recognize that *Dionisio* and *Bransburg* v. *Hayes*, 408 U.S. 665, 701 (1972), on which this passage is based, dealt with grand jury investigation and the gathering of evidence. However, as revealed by the reliance on *Costello* v. *United States*, *supra* at 362, in *Branzburg*, it is apparent that the Supreme Court had in mind both the investigatory function and "instituting criminal proceedings . . . . In fact, grand jurors could act on their own knowledge and were free to make their [own] *presentments* or *indictments* on such information as they deemed satisfactory." *Costello* v. *United States*, *supra* at 362 (emphasis supplied).

sider the matter would surely impede and frustrate the administration of the criminal laws.[6]

This body of decisional law has likewise eroded so much of the *Jones* decision (Part VI) as may be read to permit inquiry into the evidentiary basis of the indictment. In any event, it is apparent that the resulting inquiry in *Jones* into the existence of evidence supporting the indictment independent of the accused's grand jury testimony was based on factors making that case quite distinguishable from this one. While a six-judge majority directed such inquiry on remand there was no majority rationale except to use supervisory power because of "extraordinary"

[6] The Advisory Committee Note to Rule 9 of the Proposed Amendments to the Federal Rules of Criminal Procedure, April 23, 1974, is consistent with the foregoing. The proposed amendment contemplates issuance of a summons instead of a warrant upon charge by indictment or information. However, a warrant may issue if "the government presents a valid reason therefor." The Advisory Committee Note states:

> If the government requests a warratn rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause. [H.R. Doc. No. 93-292, 93d Cong., 2d Sess. 25 (1974).]

This statement is preceded by the familiar axiom: "The indictment itself is sufficient to establish the existence of probable cause." It is thus apparent that the proposed rule does not contemplate overturning such well-established notions respecting an indictment. The proposed rule only permits such an inquiry respecting facts underlying an information.

disregard of Jones' "situation" and "customary practice." This supervisory exercise of power was a "sanction" because Jones, who had been arrested, was brought from jail to reaffirm before the grand jury an earlier illegal confession without notice to his appointed counsel. Although it is doubtful that this court is bound by an earlier ad hoc punitive exercise of supervisory power by the court in *Jones*, this case is factually so different that *Jones* would not control it in any event.

We also observe that appellee's motion to dismiss relied almost exclusively on the following quotation from Judge Edgerton's opinion in *Jones* v. *United States*, *supra* at 292-93, 342 F.2d at 871-72:

> Since an indictment obtained in violation of federal constitutional rights must be dismissed, at least where substantial prejudice resulted, the violations of Short's privilege against self-incrimination and of his right to the assistance of counsel make it necessary to dismiss the indictments against him. *This is quite independent of the fact that his written confessions, which were read to the grand jury, were obtained in violation of the McNabb-Mallory rule.* [Footnote omitted; emphasis supplied.]

The motion stated that the foregoing quotation was a conclusion of "the Court" as to "the proper remedy." The motion was misleading. That portion of the *Jones* opinion from Part V is not a holding or conclusion of the majority, but only a statement subscribed to by the author and three others. As observed, those four judges agreed with two others in Part VI in order

to obtain a majority "in . . . disposing of the dismissal matter". *Id.* at 294, 342 F.2d at 873.[7]

Appellee's assertion (Brief at 34) that the trial court had discretion to dismiss this indictment is too broad. Authority of the trial court to go behind an indictment is quite limited and discretion thereunder must be exercised only in rare instances consistent with recognized independence of a grand jury. An indictment may be dismissed under Federal Rule of Criminal Procedure 6(b) and Superior Court Criminal Rule 6(b) for infirmity in grand jury composition. In the discretionary sphere, an indictment may be dismissed if not speedily presented. *See* FED. R. CRIM. P. 48(b); SUPER. CT. CRIM. R. 48(b). If a variance between the trial proof and the charge becomes apparent the court must look to determine whether the indictment returned is the one voted on the evidence presented. *E.g.*, *United States* v. *McBride*, —— F.2d —— (D.C. Cir., No. 72-1394, May 7, 1974). *See also Gaither* v. *United States*, 134 U.S.App.D.C. 154, 413 F.2d 1061 (1969), where a procedural irregularity in voting the indictment left doubt that the indictment returned was the one intended.

Except in situations as above, the indictment speaks for itself. The Fifth Amendment right not to be

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[7] Even the authority relied on by Judge Edgerton (*Cassell* v. *Texas*, 339 U.S. 282 (1950)) concededly did not support his view that dismissal of the indictment is an accepted remedy. That case dealt with an unconstitutionally constituted grand jury and in such cases the remedy is clear and provided by law. *See* FED. R. CRIM. P. 6(b).

charged but by indictment of a grand jury is not assured by permitting a general inquiry whether a legally sufficient case was presented. That right is not to be indicted for a legally sufficient case, for sufficiency of the evidence is a trial question and not one for pretrial resolution.

We, therefore, are not evaluating trial court action under the familiar but rigid axiom that discretionary action cannot be upset save for an abuse of that discretion. If that standard of review were to be applied we would be obliged to look to all circumstances of the case and decide whether the grand jury should be required to reconsider indicting appellee without his testimony.[8] The issue presented here is whether the grand jury evidence was to be quantitatively viewed without considering appellee's testimony because of the suppression order. *United States* v. *Blue, supra*, answers in the negative and is reinforced by the recent Supreme Court decisions attesting to the nature and independence of federal grand juries. *See United States* v. *Calandra, supra; United States* v. *Dionisio, supra; Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972).[9]

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[8] In that event the grand jury would have substantially the same evidence presented to it.

[9] It would, of course, be a different situation if appellee, before testifying, had instituted proceedings to quash the summons on constitutional grounds, or claim his Fifth and Sixth Amendment rights. *See United States* v. *Calandra, supra,* 94 S.Ct. at 619. This is the thrust of statements from *Calandra* and *Dionisio* on which the dissent places too broad a significance.

The order appealed from is affirmed in part and reversed in part and the case remanded with instructions to reinstate the indictment.

So ordered.

KERN, *Associate Judge*, concurring in part and dissenting in part: Appellee, suspected by police and prosecutor of grand larceny and receiving stolen goods, was haled before the grand jury pursuant to its subpoena. Once he was in the presence of the jurors uncounselled, an Assistant United States Attorney read him the so-called *Miranda* warning from the standard form used routinely by the police department when making arrests. Appellee acknowledged the warning, signed the waiver on the back of the form, proceeded to testify and was thereafter indicted. The trial court found invalid this purported waiver of his right against self-incrimination on the ground that the warning appellee had received was inadequate and therefore his waiver was neither intelligent nor knowing. The majority upholds this finding and I concur.

The trial court, after reading *in camera* all the testimony before the grand jury, also found, and the majority does not disagree, that:

> [I]n the absence of . . . [appellee's] testimony before the Grand Jury, no competent evidence exists upon which the grand jury could rely in properly returning the instant indictment. . . .

The trial court then dismissed the indictment, presumably exercising its discretion in reliance upon the applicable case law in this jurisdiction, *Jones* v. *United States*, 119 U.S.App.D.C. 284, 290-91, 342 F.2d 863, 869-70 (1964). *See also United States* v. *Tane*, 329 F.2d 848, 583 (2d Cir. 1964).

The majority opinion overturns the trial court's dismissal, stating (at 8):

> To permit this indictment to be challenged for *inadequate evidence* and require the grand jury to reconsider the matter would surely impede and frustrate the administration of the criminal laws. (Emphasis added.) (Footnote omitted.)

With all deference, to describe the evidence here merely as "inadequate" is itself inadequate; the evidence was extracted by the grand jury in violation of appellee's Fifth Amendment right. To permit a grand jury to violate appellee's constitutional privilege by first improperly obtaining from him incriminatory evidence *and* then proceeding to indict on that evidence *alone* is scarcely consistent with or conducive to the proper administration of the criminal laws in this jurisdiction.

The cases cited by the majority in concluding that this indictment, which rests *only* upon appellee's testimony to the grand jury, support in my view the trial court's dismissal rather than the majority's conclusion. They reiterate the constraints that exist on actions by the grand jury—that body which the Supreme Court has characterized as "the grand inquest." *Hendricks* v. *United States*, 223 U.S. 178,

184 (1912). Thus, in *United States* v. *Dioniso*, 410 U.S. 1, 11 (1973), the Court stated:

> This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. *The grand jury cannot require a witness to testify against himself* . . . . (Emphasis added.)

In *United States* v. *Calandra*, —— U.S. ——, 94 S. Ct. 613, 619 (1974), the Court pointed out:

> Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but *it may not itself violate a valid privilege*, whether established by the Constitution, statutes, or the common law. . . . (Emphasis added.) (Footnote omitted.)

In *United States* v. *Blue*, 384 U.S. 251, 254 (1966), upon which the majority lays particular stress, the Supreme Court considered an order by the trial court that, if upheld, would have *ended* the criminal case and exculpated the defendant rather than an order that merely "abate[d] the prosecution on account of some normally curable defect." Here, it is not suggested that the trial court's dismissal in this case, if affirmed, would preclude a new charge and further prosecution of appellee. Also the evidence challenged in *Blue* had not been acquired as a result of the grand jury's *own* action as is the case here.[1]

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[1] The Court in *Blue* stated in dicta that dismissal of the indictment in that case would not have been justified even had the tainted evidence been presented to the indicting grand jury. *United States* v. *Blue*, *supra* at 255 n.3. This is

I view the facts of the instant case as unusual, occurring as the result of an isolated and unlikely-to-be-repeated prosecutorial aberration. Consequently, these unique facts remove this case from the usual rule that an indictment resting upon *some* incompetent evidence cannot be challenged if facially valid. Accordingly, I would affirm the trial court in all respects.

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to me simply a restatement of the accepted rule that an indictment is not invalid because it is based on *some* incompetent evidence. *See Coppedge* v. *United States,* 114 U.S.App. D.C. 79, 311 F.2d 128 (1962). The question here, on the other hand, is whether an indictment may be sustained when it is based *wholly* on illegally obtained evidence. The trial court concluded in the negative and I quite agree.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7609

16947-73-A-B

[Filed Nov. 6, 1974, District of Columbia Court of Appeals, Alexander L. Stern, Clerk]

January Term, 1974

UNITED STATES, APPELLANT

v.

GREGORY V. WASHINGTON, APPELLEE

Appeal from the Superior Court of the District of Columbia, Criminal Division.

BEFORE: Kern, Nebeker and Pair,* Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is

ORDERED and ADJUDGED by this Court that the order on appeal herein, insofar as it suppressed

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* Retired as of April 14, 1974.

appellee's grand jury testimony as trial evidence, be, and the same is hereby, affirmed, and it is

FURTHER ORDERED and ADJUDGED that the aforesaid order, insofar as it granted appellee's motion to dismiss the indictment, be, and the same is hereby, reversed and this cause is remanded to the trial court with instructions to reinstate the indictment for the reasons set forth in the opinion filed herein this date.

Per Curiam.

For the Court:

/s/ Alexander L. Stevas
Alexander L. Stevas
Clerk

Dated: Nov. 6, 1974.

Opinion per Associate Judge Frank Q. Nebeker.

Separate opinion per Associate Judge John W. Kern, III, dissenting in part and concurring in part.

APPENDIX C

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Docket No. 16947-73

UNITED STATES OF AMERICA

vs.

GREGORY V. WASHINGTON, DEFENDANT

SUPPRESSION HEARING

June 29, 1973

Hon. Joseph M. Hannon, presiding

Volume: I
Pages: 70-71

John F. Hronzick
Official Reporter
Civil Division Building
Superior Court,
District of Columbia
Washington, D.C.

* * * *

[70] THE COURT: I hold that the warning that was given by Mr. Shine to this defendant before the Grand Jury is inadequate, and that as the Supreme Court has said, a heavy burden rests on the Government to demonstrate that a defendant knowingly and intelligently waived his privilege against self-incrimination, and that was in *Miranda* v. *Arizona* where the Supreme Court first said that.

I hold that whatever validity that the PD Form 47 has insofar as used by the Metropolitan Police officers, the use of which I do not question, and the validity of which I do not question because it is being used by a police officer on the street under circumstances as to which he has made an arrest, and the Supreme Court has there directed that the warning at that time be given, but I hold that something more, I respectfully say, is required of the United States Attorney's Office with respect to people that they view as suspects that they bring before the Grand Jury.

Now what is at least required in my judgment, and I do not find it in this case, was the requirement that inquiry be made of the suspect to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitu- [71] tional right and in the event that he does make incriminatory statements, to wit, and more specifically, "that it could result in his indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prosecution for a criminal offense and whatever you say here could at that time be used against you," and I find on the basis of this record that there is an abuse of any evidence which would satisfy me that the United States Attorney's Office as distinguished

from a police officer assured that in this case an intelligent and knowing waiver of Fifth Amendment rights was exercised.

Now, there remains still the question of whether or not I should dismiss the indictment. In the absence of knowing what other testimony there was before the Grand Jury, I can't rule on that.

MR. BEIZER: Your Honor, may I continue this then for the Government to present it?

THE COURT: Well, do you have the Grand Jury transcript?

MR. BEIZER: Yes, I have the entire Grand Jury transcript, Your Honor, and I would submit it to you for your consideration.

THE COURT: All right, you submit it in camera and I'll look at it and I'll rule as to whether or not it should be dismissed.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 567432 99.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1106

UNITED STATES OF AMERICA,

Petitioner

—v.—

GREGORY V. WASHINGTON

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED MARCH 5 1975
CERTIORARI GRANTED JUNE 1, 1976

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1106

UNITED STATES OF AMERICA,

Petitioner

—v.—

GREGORY V. WASHINGTON

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

INDEX

DOCKET ENTRIES

3/20/73 Indictment filed. Assigned to Judge Braman, arraignment set for 4/2/73 at 9:00 a.m.

4/2/73 Arthur B. Reid, Official Court Reporter. Defendant informed of complaint and right to counsel, plea of not guilty entered. Bond is personal recognizance. Case continued until 5/30/73 for trial and 5/16/73 for status hearing.

4/13/73 Defendant's motion to extend time for filing motions filed.

4/18/73 Defendant's motion to extend time for filing granted. Defense motion due by 4/23/73.

4/24/73 Government's motion to certify indictment as Felony II filed.

4/25/73 Defendant's motion to quash indictment and motion to suppress statements filed.

5/8/73 James Holland, Official Court Reporter. Government's motion to certify case to felony II section heard and granted. Case certified to Felony Branch to be certified to a felony I Judge Bond continues.

5/9/73 Reassigned to Judge Hannon.

5/16/73 Salvatore J. Rizza, Official Court Reporter. Case Continued until June 4, 1973, for trial. Defendant not present, attorney to notify defendant for trial date.

6/4/73 Louis P. Waibel, Official Court Reporter. Case continued until 7/24/73, for trial. Motion to be heard on 6/29/73. Defendant advised.

6/29/73 John Hrozenck, Official Court Reporter. Motion to suppress statements made to police denied. Motion to suppress statements made in Grand Jury granted.

7/5/73 Patricia Y. Sanborn, Official Court Reporter. The defense motion to dismiss indictment is hereby ordered granted. The court further ordered, that the Grand Jury testimony filed in this court jacket remains therein pending possible appeal. (see order within).

7/9/73 NOTICE OF APPEAL FILED.

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

Case Numbers: 69124-72 and 69110-72

UNITED STATES OF AMERICA

vs.

RUBEN WOODARD AND SAMUEL LEE ZIMMERMAN

February 5, 1973

The testimony of GREGORY VINCENT WASHINGTON was taken in the presence of a full quorum of the Grand Jury.

BEFORE:

RICHARD S. SHINE, ESQ.
Assistant United States Attorney

• • •

[Examination of Gregory Vincent Washington]

• • •

[3] Q Have a seat behind you there.

Could you state your full name and address, please?

A Gregory Vincent Washington, 1138 5th Street, Northeast.

Q Sir, is that an apartment or a house?

A A home.

Q Sir, before I ask you any questions. You're here under subpoena, is that correct?

A Yes.

Q Before I ask you any questions I have to tell you what your rights are. I'd like you to listen carefully and I'm going to ask you some questions about your rights afterwards.

You are not under arrest. You're just here by way of subpoena.

Before I, or anybody else in the Grand Jury, ask you any questions you must understand what your rights are.

You have a right to remain silent. You are not [4] required to say anything to us in this Grand Jury at any time or to answer any questions.

Anything you say can be used against you in Court.

You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.

If you cannot afford a lawyer and want one a lawyer will be provided for you.

If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.

You also have the right to stop answering at any time until you talk to a lawyer.

Now, do you understand those rights, sir?

A Yes, I do.

Q And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?

A Yes, sir.

Q And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

A No, I don't think so.

Q Okay, sir, could you fill out the back of this card? Those are the same questions, I think.

You read or had read to you the warning as to your [5] rights.

A Since you've read them to me do I have to read them?

Q You have had them read to you. The answer to that would be "yes", right?

Mr. Washington, do you own a white panel truck, a Ford van truck, white in color, 1965, D. C. tags C-14170?

A I did.

Q Did you own that truck on December 3rd, 1972?

A Yes.

Q What has happened to the truck?

A It's been sold.

Q I see. When did you sell it?

A About three weeks ago.

Q On December 3rd, 1972, were you driving the truck at all that day?

A Yes.

Q What were you doing with it?

A We had taken a trip, Ruben Woodard, Sammy Zimmerman and myself, and we went to Baltimore.

Q What time did you go to Baltimore? When during that day about?

A What time did I arrive in Baltimore?

Q Yes.

A About 3:00 or 4:00 o'clock in the evening.

Q 3:00 or 4:00 p.m., in the afternoon?

[6] A Yes.

Q What had you gone to Baltimore for?

A We went to a junk yard that was in Baltimore.

Q Did you pick up some stuff?

A Yes, parts.

Q Where was the junk yard?

A (No response.)

Q Do you know the name of the junk yard?

A No, I don't. It's out U. S. 1 but it's in Baltimore. I don't know the name of it.

Q What kind of parts did you pick up at the junk yard?

A Two rear axles and a side vent frame, window frame, for my car.

Q This was all for your car?

A Yes.

Q What kind of car is that?

A '62 Chevrolet.

Q Were you driving?

A Yes.

Q What time did you leave Baltimore to come back to Washington that day?

A About 5:30 or 6:00.

Q Did all three of you come back to Washington?

A Yes, sir.

Q What happend when you got back to Washington? What [7] did you do?
A I took Woodard and Zimmerman home.
Q Where did you take them?
A I took both of them over to Zimmerman's wife's house on 4th and Newcomb Street, Southeast.
Q What time was that that you dropped them off at Zimmerman's wife's house?
A About 8:30 or 9:00 o'clock.
Q At night?
A Yes.
Q That's on the night of December the 3rd?
A Yes.
Q What did you do after that?
A I just started driving. I went over to Georgetown.
Q What were you going to Georgetown for?
A I was going to stop past the Circle theatre to see what was playing up there. I usually go up there sometimes.
Q You mean go to a movie?
A Yes.
While I was up that way there was a guy up there and he asked me would I give him a lift and I said, "Okay".
Q Where did you first see this guy?
A It was in the 2100 block of Pennsylvania Avenue.
Q Is that at the corner of—on Pennsylvania Avenue between 21st and 22nd?
[8] A Yes.
Q Did he have anything with him?
A He had his motorcycle.
Q Was that a Honda motorcycle, did you notice?
A I don't know what the name was.
Q What color was it?
A Red and silver.
Q Had you ever seen that man before?
A No, I hadn't.
Q Were you stopped when he first approached you, or did he wave you down, or what?
A I was already stopped. He asked me before I got back to the truck.

Q Why had you stopped?
A To see what was at the Circle Theatre.
Q You had just been to see what was at the Circle Theatre and you were coming back to your truck when this man stopped you?
A Yes.
Q Did he have his motorcycle on the sidewalk or the street?
A It was in the street.
Q Was he riding it or pushing it?
A Neither one. It was just sitting there.
Q Just sitting there?
[9] A Yes.
Q Had you ever seen this man before?
A No, I hadn't.
Q Can you describe him?
A He has kind of blondish hair, a little shorter than I was, he's a caucasian.
Q What was he wearing?
A Jeans jacket and pants.
Q Did he say where he wanted you to take him?
A Yes.
Q Where?
A Up on 33rd and Reservoir Road, I guess it was.
Q What did he say was there?
A That's where he wanted me to drop him off at.
Q Did he say what was up there, why he wanted to go there?
A No.
Q Did he say that the motorcycle didn't work?
A Yes.
Q Did you help him put the motorcycle in the truck?
A No, I didn't.
Q Did he put it in the truck himself?
A Yes.
Q Then what happened after he put the motorcycle in the truck?
[10] A I went down Pennsylvania Avenue to Washington Circle and then took the cutoff on K Street.
Q Was he in the truck with you?

A Yes. I was heading toward Wisconsin Avenue and K and truck broke down.

Q What went wrong with the truck, do you know?

A No, 'cause Sammy Zimmerman had been doing work to it. That past week he had worked on it and he knew what was wrong with it.

Q What happened when the truck broke down? Where was it that the truck broke down?

A 29th and K.

Q 29th and K, Northwest?

A Yes.

Q What happened when the truck broke down?

A I went up to the BP station on, I think it was 29th or 30th Street and M Street, Northwest.

Q What did the man who was in the truck with you do?

A I had to lock the truck, you know, 'cause I had some of my personal belongings in it, so he stood on the outside of the truck and waited for me to come back.

Q And you went to the BP gas station and did what?

A Called Zimmerman up.

Q What did you tell Zimmerman?

A To come and pick the truck up, to fix the truck, that [11] the truck had broke down again.

Q Did he say he was going to come down?

A Yes.

Q What did you do then?

A I stayed up at the BP station.

Q Where did you tell Zimmerman to meet you?

A At the BP station.

Q Then what happened?

A Well, I waited and waited. I waited long enough where they should have been up there and no one showed so I went back down to where the truck was and the truck was gone.

Q When you talked to Mr. Zimmerman on the phone and told him to come down to the BP station, did you tell him where the truck had broken down?

A Yes.

Q I show you a photograph which is marked Number 3 in blue pen, or black pen, up in the right hand corner.

Do you recognize that photograph? What is it the photograph of?

A That's the inside of my truck.

Q Is that the motorcycle that was in there?

A It looks like but it wasn't laying like that. It wasn't laying in the same place.

Q Did you have a battery in the back of the truck?

A Yes, I had quite a few junk batteries in the back of the truck.

[12] Q Did you have any seats in the back of the truck?

A Yes, two white bucket seats.

Q Where did you get those?

A From a friend of mine that works at Sunoco station. They came off his Plymouth Belvedere.

Q What did you have those for?

A He had junked the car and we were planning on keeping the bucket seats and putting them on the side of the truck.

Q I show you a photograph marked Number 12. Can you tell me what other property is shown in that photograph?

A A spare tire.

Q Where did you get that?

A This was in the trunk of Zimmerman's car and we cleaned it out.

Q Did you ever see this man—the man who put the motorcycle in the back of your truck, did you at any time see him wheeling or pushing the motorcycle?

A No.

Q It was just standing on—did you say the street or the sidewalk?

A The street.

Q Was he standing next to it on the street?

A He was standing right close to it.

Q When you called Mr. Zimmerman to tell him to come down to fix the truck, did you tell him that you had a [13] motorcycle in the back of it?

A No, I didn't.

MR. SHINE: Any questions, Mr. Foreman?

A JUROR: What happened to the guy that you picked up?

THE WITNESS: I don't know, because, when I came back down on K Street looking for the truck, he and the truck was gone.

A JUROR: You talked to Mr. Zimmerman after this?

THE WITNESS: After the truck was gone?

A JUROR: Yes.

THE WITNESS: No.

BY MR. SHINE:

Q You at no time talked to Mr. Zimmerman?

A I talked to him—I think he had called his wife. I hadn't talked to him till the next day. He called his wife and told his wife that he was being held at the Police Station.

Q Have you at any time since then talked to Mr. Zimmerman?

A Yes.

Q About this incident?

A Yes.

Q What did he tell you?

A He told me that the officer had taken his license and [14] taken the registration of the truck. The only way I could get the truck back was for me to go up there myself to get it.

Q What did he tell you about how he was arrested?

A He didn't tell me that.

Q You didn't ask him?

A No.

Q You weren't curious about what happened to your truck and why your truck was impounded and what the circumstances were?

A Not really. Well, Officer—the Auto Squad—(Snood), I think his name is, he had called my mother and my mother informed me and I talked to him and he told me that that the motorcycle was stolen in the back of the truck.

THE FOREMAN: After you left the service station that night and went back to where your truck was parked and the truck was gone did you then call the police?

THE WITNESS: No.

THE FOREMAN: You didn't have any idea who had the truck?

THE WITNESS: I figured that Zimmerman might have had it.

A JUROR: Do you think he would have gone off and left you like that?

THE WITNESS: I guess maybe he couldn't find a BP station.

[15] A JUROR: How far was the BP station from where the truck broke down?

THE WITNESS: Right up 29th Street, one block.

MR. SHINE: You mean he could have found the truck where it had broken down but he couldn't find the BP station?

THE WITNESS: I'm saying he might not have found the BP station.

THE FOREMAN: Have you found out who did take your truck?

THE WITNESS: He had it.

THE FOREMAN: Zimmerman did take your truck?

THE WITNESS: Yeah.

A JUROR: Did he state whether or not this white guy was still there?

THE WITNESS: No, he said that he didn't see any white guy.

THE FOREMAN: The motorcycle was still in the truck?

THE WITNESS: Was the motorcycle still in the truck when he got in the truck?

THE FOREMAN: Yes.

THE WITNESS: Yes.

BY MR. SHINE:

Q Did he tell you that?

A Yes.

[16] Q You have talked to him about what happened when he got arrested, is that right?

A He told me that there was a motorcycle in the back of the truck.

Q When he got arrested?
A Yes.
Q You have talked to him about what happened? You have talked to Mr. Zimmerman about what happened when Mr. Zimmerman got arrested, is that correct?
A Yes.
Q When was that?
A It was that Monday.
Q The Monday after he was arrested?
A Yes.
Q What did Mr. Zimmerman tell you about the circumstances of his having been arrested?
A He asked me where the motorcycle came from and I told him.
Q What specifically did you tell him?
A That I had picked up the guy and that the guy put the motorcycle in there and I was giving him a lift when the truck broke down.
Q What did Mr. Zimmerman tell you about how he got arrested?
A He told me that the motorcycle had been stolen.
[17] Q Did he tell you what he had done when he first got to the truck, who was there, or what was happening?
A No.
THE FOREMAN: How would the police know the motorcycle was in the truck?
THE WITNESS: I don't know.
THE FOREMAN: What was wrong with the truck did he tell you?
THE WITNESS: The carburetor was bad.
A JUROR: Mr. Washington, you said that you locked your truck up because you had personal belongings in it?
THE WITNESS: Yes.
A JUROR: When Mr. Zimmerman reported to the truck did he have a key to your truck?
THE WITNESS: He has a key, he had a key, I mean.
A JUROR: Did you ask him why he didn't report to the location you asked him instead of going straight to the truck?

THE WITNESS: No, I didn't.
MR. SHINE: Any other questions?
A JUROR: What did you do after you found the truck was gone?
THE WITNESS: I called back to Mr. Zimmerman's house and his wife said that he hadn't called back yet so I went down to my girlfriend's house. I caught a bus and went to my girlfriend's house.
[18] A JUROR: You didn't look for the truck anymore?
THE WITNESS: I kept calling his wife's house. I think it was about 12:30, she called up my girlfriend's house and told my girlfriend that Zimmerman was in jail.
MR. SHINE: Sir, when were you born?
THE WITNESS: November 3rd, 1952.
MR. SHINE: Any other questions?

(No response.)

All right, sir. Will you step outside?

(Whereupon, the witness was excused.)

Whereupon,

GREGORY VINCENT WASHINGTON

was recalled as a witness and, having first been previously duly sworn by the Foreman of the Grand Jury, was examined and testified as follows:

BY MR. SHINE:

Q Mr. Washington, you're still under oath, okay?
A Yes, sir.
Q Where did you say you dropped off Mr. Zimmerman and Mr. Woodard?
A At Mr. Zimmerman's house.
Q Which is where?
A 4th and Newcomb Street, Southeast.
Q You went from there directly to the Circle Theatre, or did you ride around in Georgetown?
[19] A Drove around.

Q Just drove around?
A Yes.
Q Did you drive up by the Hot Shoppe in the 4100 block of Wisconsin Avenue?
A No.
Q You weren't up in that direction at all?
A No.
Q Were you standing by the back of the truck when this man put the motorcycle in the truck?
A No.
Q Where were you?
A Seated in the driver's seat.
Q You didn't go around back and watch this man put the motorcycle in the back of your truck?
A No. I could see through the back.
Q You were able to observe him putting it in?
A Yes.
Q Was he able to steer the motorcycle at all?
A I don't know.
Q Did he have any difficulty putting the motorcycle in the back?
A Yes.
Q What kind of difficulty?
A It was pretty loaded with junk batteries and auto [20] parts and stuff and he was having a problem trying to keep it rolling.
Q It was rolling?
A He had to slide it.
A JUROR: How high is that back opening of the truck off the sidewalk, or off of the street?
MR. SHINE: Ladies and gentlemen, the reporter is having trouble hearing.
A JUROR: How far would he have to lift that to get it into the truck?
THE WITNESS: About two feet.

BY MR. SHINE:

Q You didn't help him lift it the two feet?
A No.

Q Was this man going to pay you for giving him a lift out there?
A No. I given hitchikers lifts all the time.
Q With motorcycles?
A No.
A JUROR: Do you have any familiarity with motorcycles?
THE WITNESS: No.
A JUROR: Do you know whether or not anybody else assisted this man in putting this bike in the back of the truck?
THE WITNESS: No, no one.
[21] A JUROR: No one helped him?
THE WITNESS: No.
A JUROR: Did he have a board to roll it up?
THE WITNESS: No.

BY MR. SHINE:

Q Do you know how Mr. Zimmerman got down to where your truck was, Mr. Zimmerman and Mr. Woodard from his wife's house?
A No, I don't.
Q Do you know whether Mr. Zimmerman and Mr. Woodard have a car?
A They have a car but I don't think they drove them down.
Q Why not?
A I don't know. I don't think they drove them down because they just said that they'd be right down.
Q How would they get down if they didn't get down in a car?
A Somebody might have took them down.
A JUROR: Did this gentleman place this motorcycle in the rear of the truck or the side?
THE WITNESS: In the rear.
A JUROR: He brought it up through the rear?
THE WITNESS: Yes.

BY MR. SHINE:

[22] Q When you talked to Mr. Zimmerman did he say that he was going to come down with Mr. Woodard?

A Were him and Mr. Woodard coming down?

Q When you talked to Mr. Zimmerman on the phone from the BP station to ask him to come down and fix the truck, did he say that he was going to come down with Mr. Woodard?

A Was he coming down with Woodard?

Q Did he tell you that he was coming down with Mr. Woodard?

A No, he didn't.

Q Do you know why Mr. Woodard would have come down?

A There was no reason for him to stay over his wife's house, with his wife.

Q With Mr. Zimmerman's wife, you mean?

A Right.

A JUROR: Mr. Washington, how long did you wait at that BP station before you went back to the truck?

THE WITNESS: About two and a half hours.

BY MR. SHINE:

Q What time was it, if you can recall, when the truck broke down? What time did you say you dropped off Mr. Zimmerman?

A Around 8:00, 8:30.

Q You dropped him off around 8:00 or 8:30. How long did you drive around before you went to the Circle Theatre?

[23] A Not too long. I just headed south on the Southwest Freeway, I think it's part of 95, and went through the park up 17th Street to Pennsylvania Avenue and went straight on up Pennsylvania.

Q You got there what, about 15 or 20 minutes later to that vicinity?

A Yes.

Q Is that when you saw this man?

A Yes.

Q When did you drive around Georgetown or did you go directly to the Circle Theatre?

A I hadn't gotten to Georgetown. I was going to drive to Georgetown after I had stopped past the Circle Theatre.

Q You would have gotten to the vicinity of the Circle Theatre what about a quarter past 8:00 or 8:45, sometime around there? Could it have been any later than quarter of 9:00 at night when you got to the Circle Theatre?

A Yes.

Q How much later?

A Maybe about 15 minutes.

Q It was no later than 9:00 o'clock at night?

A No.

Q By the time this man got his motorcycle in the truck and you drove to where it broke down, what time would it have been then at the latest?

[24] A 9:30 or 9:45.

Q It would have taken Mr. Zimmerman about 15 to 20 minutes to drive from his house down to where the truck was?

A Yes.

Q And you waited at the gas station for two and a half hours you said?

A Yes.

MR. SHINE: Any other questions?

A JUROR: Has any effort been made to locate the owner of the vehicle?

MR. SHINE: There has been testimony to that already before another Grand Jury. The owner of the vehicle has testified.

A JUROR: Do you know how many CC's this motorcycle was?

THE WITNESS: No.

MR. SHINE: Any other questions?

A JUROR: When he put it in the truck did he leave it facing the front of the truck?

THE WITNESS: The motorcycle was it facing the front of the truck?

A JUROR: Yes.

THE WITNESS: Yes. It looked like it was sitting different in the photograph.

A JUROR: You said that you observed him putting the [25] bike in the truck?

THE WITNESS: Yes.

A JUROR: Tell me, describe to me how he put this bike in the truck.

THE WITNESS: He lifted the front wheel up and set it in the truck then he tilted it to the side because it wouldn't go straight in.

A JUROR: The truck must be a little bit low then if he could put the front wheel in it. It must have been right low.

THE WITNESS: About two feet.

A JUROR: A man can't lift a motor this size by himself.

THE WITNESS: Will you repeat your question?

A JUROR: I want you to explain how he put it in the truck.

THE WITNESS: Right.

He put the front wheel up there first and then he got in back of it and he started pushing it and it started to go into a tilt and he slid it the rest of the way up.

A JUROR: Do you know anything about a motorcycle?

THE WITNESS: No.

A JUROR: If I asked you about a lock—do you know that motorcycles have a front wheel lock on them?

THE WITNESS: Yes.

[26] A JUROR: That would mean the wheel could not turn?

THE WITNESS: I think so.

A JUROR: Did the motorcycle appear to be that way to you? In other words, was the front wheel turned?

THE WITNESS: I didn't notice it.

MR. SHINE: You didn't notice whether the front wheel could be turned or not by this man?

THE WITNESS: No, I didn't.

A JUROR: Did you state that the wheels would not turn over, this is why he had to slide it?

THE WITNESS: No, because of the back of the truck, there were batteries and stuff laying down in it and he had to slid it in.

A JUROR: You did say that he picked it up off the street?

THE WITNESS: Yes, he picked it up.

BY MR. SHINE:

Q Did you have to back the truck up to where the motorcycle was?

A Yes.

Q Why did you have to do that? Did he ask you to do that, that man?

A I just backed it on up.

Q How far was the motorcycle from where you had parked the truck when you first saw the motorcycle?

[27] A About six cars back. I was parked in front the GH Medical Center, or something like that, on Pennsylvania Avenue and he was by this little bar and restaurant next door to the Circle Theatre.

A JUROR: When you picked him up did he ask you to take him to a specific address?

THE WITNESS: No.

A JUROR: He just told you what?

THE WITNESS: 33rd and Reservoir Road.

BY MR. SHINE:

Q He didn't tell you what was up there?

A No.

Q You didn't ask him?

A No.

A JUROR: Why do you remember the place so plainly?

THE WITNESS: 33rd and Reservoir Road?

A JUROR: Yes.

THE WITNESS: I just remember it.

A JUROR: Mr. Washington, did he pay you anything?

THE WITNESS: No, he didn't.

A JUROR: You just did it out of your own good will?

THE WITNESS: Yes.

BY MR. SHINE:

Q Did you ever see this man before that night?
A No, sir.
[28] Q Have you ever seen him since?
A No, sir.
Q Did he tell you what his name was?
A No.
Q He's just a complete stranger to you?
A (Nodding).
Q What?
A Yes, sir, I'm sorry.
MR. SHINE: Any other questions?
A JUROR: How much did this man seem to weigh?
THE WITNESS: I'm not sure.
A JUROR: You'd probably guess 150 or 60?

BY MR. SHINE:

Q How much do you weigh?
A 264.
Q Did he weigh as much as you?
A No, smaller.
Q Was he heavy build, medium build?
A Medium build, I think.
Q Did he look like he weighed more than 200 pounds?
A No.
MR. SHINE: Any other questions?

(No response.)

All right, sir. You may wait outside.

(Whereupon, the witness was excused.)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

• • • •

Criminal No. 16947-73

THE UNITED STATES OF AMERICA

v.

RUBEN WOODARD, SAMUEL L. ZIMMERMAN,
GREGORY V. WASHINGTON

Violation: 22 D.C. Code 2201; 2205
(Grand Larceny; Receiving Stolen Property)

The Grand Jury charges:

FIRST COUNT:

On or about December 3, 1972, within the District of Columbia, Ruben Woodard, Samuel L. Zimmerman and Gregory V. Washington stole property of Eugene L. Thornton, Jr., of a total value in excess of $100, consisting of a motorcycle.

SECOND COUNT:

On or about December 3, 1972, within the District of Columbia, Ruben Woodard, Samuel L. Zimmerman and Gregory V. Washington, with intent to defraud, received property of Eugene L. Thornton, Jr., of a value in excess of $100, consisting of a motorcycle, which had been stolen, knowing and having cause to believe the said property had been stolen.

A TRUE BILL:

/s/
Foreman

/s/ Harold H. Titus, Jr.
Attorney of the United States in
and for the District of Columbia

[1] IN THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Docket No. 16947-73

UNITED STATES OF AMERICA

v.

GREGORY V. WASHINGTON, DEFENDANT

Washington, D. C.

Friday, June 29, 1973

The above-entitled cause came on for hearing before the HONORABLE JOSEPH M. HANNON, Judge, in Courtroom No. 4, Civil Division Building, commencing at approximately 2:15 o'clock p.m.

APPEARANCES:

On behalf of the Government:

RICHARD L. BEIZER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

MELVIN CHERRIN, Esquire
601 Indiana Avenue, N.W.
Washington, D.C. 20004
Tel. No. 628-1200

* * * *

[3] TRANSCRIPT OF TESTIMONY

* * * *

THE COURT: All right. Let's go forward.

MR. BEIZER: Your Honor, so that I am perfectly clear as to where we stand at this point, is Your Honor considering both the motion to suppress the statement and the motion to dismiss the indictment at this time?

THE COURT: That is what is before me.

MR. BEIZER: I'm sorry, Your Honor. I didn't hear you.

THE COURT: I said, yes, that's what is before me.

MR. BEIZER: At this point, Your Honor, I would like to call Detective Snoots because he was the one who had contact with Mr. Washington on December 4th when I believe the first motion was involved.

THE COURT: All right. This is directed towards the intelligent waiver of Fifth Amendment rights as I understand it.

MR. BEIZER: This would be on the motion to suppress after the statement was made at the Police Department.

THE COURT: There are two statements, one before the Grand Jury, and another one made before the Police Department?

MR. BEIZER: That is correct, Your Honor.

THE COURT: All right. Which came first?

[4] MR. BEIZER: The police statement.

THE COURT: All right. Let's get to it.

* * * *

[DIRECT EXAMINATION OF RALPH L. SNOOTS]

MR. BEIZER: Perhaps he should go forward?

THE COURT: It's Mr. Cherrin's motion and as far as I'm concerned he bears the burden, but if it will expedite it you can go forward if you and he agree.

MR. BEIZER: I'll go forward, Your Honor.

BY MR. BEIZER:

Q Detective, in a loud clear voice, will you state your full name and spell it, please?

A Ralph L. Snoots, S-n-o-o-t-s, Plainclothes Detective assigned to the Auto Theft Section, Metropolitan Police Department, Washington, D.C.

Q Were you so assigned on the 3rd day of December 1972?

A I was, sir.

Q And what time were you working during that day, if you recall?

A Reflecting to my notes, I see that I was working [5] the seven in the evening to three in the morning shift.

Q Did there come a time when you received a call for a stolen automobile or possibly a stolen truck on that evening?

A I did, sir.

Q Will you tell the Court what happened from that point, please?

A On—

MR. CHERRIN: (Interposing) Your Honor, I see that he is referring to certain notes and I would ask that I be allowed to see them.

THE COURT: Do you need them, Officer Snoots?

THE WITNESS: Well, it has been some months, Your Honor, and I do come in contact with a lot of cases.

MR. CHERRIN: I have no objection to his using the notes as long as I can take a look at them.

THE COURT: Well, if he looks at them and testifies from them, you will be able to look at them.

MR. CHERRIN: Well, he has been doing that, and I wonder if I could see them now.

THE COURT: No, not until he has testified. After he has testified, then, Mr. Cherrin, you may look at them.

MR. CHERRIN: Very well.

THE COURT: Whatever he looks at and testifies, sir, and you establish as a matter of record that he looked at it [6] and relied on it in his testimony, then you may see it.

MR. CHERRIN: Very well. I would say that he has.

THE COURT: You say what, please?

MR. CHERRIN: He has been referring to his notes.

THE COURT: Well, he hasn't done anything but give his name and he said he was assigned to the Auto Theft Squad, on December 3, 1972 he was so assigned, and on that day he received a call respecting a stolen truck. I believe that is what he testified to as the Court recalls.

BY MR. BEIZER:

Q Would you continue to tell His Honor what you did in response to that call?

A Viewing my notes, at approximately 2330 hours on December 3rd, 1972, I received a radio run to respond to the Second District Substation No. 1 which is located in the 3300 Block of Volta Place, Northwest, and on arriving there I had contact there with an Officer DuRant who was assigned to this substation.

He had placed two subjects under arrest—

THE COURT: What is his name again, please?

THE WITNESS: Officer Ralph DuRant.

THE COURT: Spell his last name.

THE WITNESS: D-u-R-a-n-t.

THE COURT: All right.

THE WITNESS: He had placed two subjects under [7] arrest for the theft and possession of a motorcycle.

Upon arriving there I interviewed one Samuel Lee Zimmerman and a Robert Woodard and both of these subjects refused any statements at that time.

I then proceeded to ascertain if the vehicle they were operating had been reported stolen.

Q What kind of vehicle was that, if you know?

A Again viewing my notes, it appeared to be a 1965 white Ford van bearing District registration C, like in Charlie, -14170.

After I had ascertained through the computer whether or not this vehicle had been reported stolen, I found that it had not. At that point I proceeded to obtain a listing on the vehicle.

Q What do you mean by a listing?

A A listing would mean our DMV files when tags are issued. It is computerized into a master book. The auditor of that section as well as the teletype section receive these books in order to ascertain the listing of tag numbers. We have them alphabetically by name and we have them by tag number and also by serial number of the vehicles.

THE COURT: Excuse me. May I ask you something, please?

Officer DuRant arrested these two men for the possession of a stolen motorcycle, is that correct?

[8] THE WITNESS: That's correct.

THE COURT: Was the stolen motorcycle inside this white van that you speak of?

THE WITNESS: Yes, Your Honor, it was. It was placed in the rear of the vehicle.

THE COURT: That was where it was when the officer arrested them, is that what you're telling me?

THE WITNESS: That's correct, Your Honor.

THE COURT: All right. So now you checked on the '65 Ford van and you find out that it has not been reported stolen, is that right?

THE WITNESS: That is correct, Your Honor.

THE COURT: All right. Go on from there.

THE WITNESS: After we found the vehicle not to be stolen, I obtained a listing by tag number on the vehicle and found that it was listed, or had a registered owner by the name of Gregory V. Washington who had an address or gave an address at the time he purchased tags of 1138 Fifth Street, Northeast, and he obtained these tags on 11/13/72.

At this point I made an attempt to contact Mr. Washington with reference to his truck. We felt at that point that the truck had possibly been stolen and was being used in the commission of another crime to transport another stolen vehicle.

I was unable to contact Mr. Washington that evening [9] but I did manage to stop by his house and leave a message with someone there for him to contact me as soon as possible with reference to his truck.

BY MR. BEIZER:

Q Was any further notice given to anyone in his house or to Mr. Washington? Did you state anything further than just to contact you with reference to the possibility of his truck being stolen?

A As far as I can remember, when I went to the premises I did ask them to have them tell him to contact me as soon as possible with reference to his truck.

Q Now this is just your unaided memory and you are not looking at your notes now, are you?

A No.

Q Now, is there any reflection in your notes as to what you actually said to that person who received your message for Mr. Washington at his house?

A No, sir. My notes were ended when I left the precinct that evening.

Q So this is just your unaided recollection and just your memory from this point on?

A That's correct.

Q All right. Officer, after you gave that message, did you at some time subsequent to that see Mr. Washington actually?

[10] A I did, sir.

Q And when did you see him, if you can recall?

A I believe it was either the next evening or the evening after that. I was also again working the evening shift from seven at night to three in the morning and Mr. Washington came down to see me.

Q This was in the evening, is that right?

A Yes.

Q Either the following day or the day after that?

A Yes, sir. I don't remember which day it was. It was one or two days after I left the note.

Q And where did he come to see you?

A He came to see me at the Auto Theft Section Office which is located at 300 Indiana Avenue, Room 3025.

Q What was your purpose in asking Mr. Washington to come down to that office?

A The reason why I asked Mr. Washington to come down was because in order to ascertain a registered owner, I would need to satisfy myself to see a proper registration for the vehicle and have that person present themselves in person to me with this registration slip and some other type of identification in order to satisfy the fact that he is the proper owner of the vehicle.

I would not accept a phone call in this particular instance.

[11] Q And what was your purpose in satisfying yourself that he was indeed the proper owner, if you indeed had such a purpose?

A I had Mr. Washington come down because, like I said, I was unable to contact him that night. If I would have contacted him that night I would have inquired of him about whether or not, of course, he was the registered owner of the vehicle, whether or not the vehicle had been stolen, whether or not he had reported it stolen or was in the process of reporting it stolen, et cetera, and I would have advised him of the circumstances surrounding our impoundment of the vehicle.

Q And when he came to see you on either the day after or the day after that, did you state to him what your purpose was in asking him to come down to see you at the police station, if you can recall?

A As far as I can remember, we had a brief conversation. It wasn't too long. I did advise him while I asked him the questions about the vehicle and did inquire, of course, as to the registration and whether or not he was the proper owner.

Q Did he satisfy you that he was the registered owner?

A He did.

Q And did you ask him if he was going to be a complainant with respect to the unauthorized use of that vehicle?

A As far as I can remember, I did ask him whether or [12] not he was wanting to press charges against the two subjects that had been operating the vehicle.

Q And what did he say?

A As far as I can remember, it went something to the effect that they were friends of his and that the truck had broken down and that they were going to fix it somehow. He went on to add although when I advised him of the circumstances surrounding how they had been arrested and why we impounded his vehicle, he stated that it was impossible for them to have stolen the motorcycle because he himself personally picked up a hippy-type person, and he gave a brief description of the subject and the motorcycle, somewhere away from where

they had been stopped prior to the officer stopping the two gentlemen.

Q Did your conversation continue after he had made that revelation that he had picked up this fellow with the motorcycle?

A At that point—

THE COURT: What do you mean?

BY MR. BEIZER:

Q Did he say anything further with respect to the motorcycle and the truck after he said that he was not going to be a complainant in a UUV case and that he indeed picked up the fellow with the motorcycle?

Did he say anything further with respect to giving [13] these fellows permission to use his truck or anything else?

A I believe he said he had given them permission to use the truck.

Q And he further stated that he was not going to press charges against them for using his truck?

A That's correct.

Q When he came to the police station, did he come there under a subpoena or under custody of any sort or was he in handcuffs at any time?

A No, sir. He came there of his own free will.

Q Can you describe the room where this interview took place for His Honor as best that you can recollect it was on the day that you had this interview with Mr. Washington?

A It was an office, it's a regular office and you have an entrance way and then there's a partition. A secretary sits at the entrance way and then there's a partition and behind the partition there are approximately thirteen or fourteen desks where the detective sit and work from.

I do remember that at that particular time we were off in a corner talking because my desk was located in a corner at that time.

Q Was there anyone else close by?

A Not that I can remember other than possibly the secretary.

Q How close would she have been away if she had been [14] there?

A Behind the partition, maybe twelve feet.

Q Were you typing or anything during the course of his discussions with you, or taking notes, to the best of your recollection?

A I don't believe that I took any notes because I had no need to really. I just wanted, you know, to verify the owner. I had the listing. That was specifically it.

Q That was in the middle of winter in December, is that right?

A I would presume in December.

Q Somewhere in December. After your interview was completed with Mr. Washington, what did he then do?

A He left.

Q And you didn't stop him or in any way inconvenience him from leaving or stand in the way of his going?

A No, sir.

MR. BEIZER: May I have the Court's indulgence, please?

THE COURT: Yes.

MR. BEIZER: No further questions, Your Honor.

THE COURT: When he said that he didn't want to press charges, is that what you said he said, that he didn't want to press charges because they were friends of his?

THE WITNESS: Yes, sir.

[15] THE COURT: And he gave permission, he said he gave permission?

THE WITNESS: Yes, sir. I asked him about, you know, why if he knew that they had the vehicle. Actually, they were standard questions that you ask of any complainant who is either missing, has lost, or is wanting to report the vehicle stolen.

THE COURT: Well, but when he tells you, "I lent them the truck," then there are no charges to press about the truck, are there?

THE WITNESS: No, sir.

THE COURT: And that's what he told you, he said, "I lent the two men the truck?"

THE WITNESS: Yes, sir.

THE COURT: "And I don't want to prosecute them because there's no way you can do that because I gave them permission to have the truck," is that what he said?

THE WITNESS: I don't recall specifically what he told me but his response was something to the effect that he had, you know, he gave me the opinion that he had no occasion to press charges since he did give permission and they were friends of his.

THE COURT: And he told you that the way that motorcycle got in the truck was that he had picked up a hippy who had this motorcycle?

THE WITNESS: Well, a hippy-type person. By that [16] I mean by dress and that the motorcycle apparently had broken down and he picked him up on, I can't recall, it was either Pennsylvania Avenue or K Street.

THE COURT: What was the motorcycle still doing in his truck? Where was the hippie, did you ask him.

THE WITNESS: Well, he stated that he was transporting him some place and that the truck had broken down and he left the hippie and the motorcycle at some location, and I don't recall the location where the truck broke down and where he left him, he left the truck and the hippie there and he left and I thought that was kind of odd, but that was approximately what he said to me.

MR. BEIZER: Your Honor, might I inquire?

THE COURT: Not yet.

MR. BEIZER: This is in regard to the questions that you have asked.

THE COURT: Not yet.

MR. BEIZER: I'm sorry.

THE COURT: After he told you that the truck broke down and he left the motorcycle and the hippie there, did you ask him how come his two friends got to be driving the truck after that?

THE WITNESS: I believe I might have mentioned something about, and again, this is strictly from memory, I might have mentioned something about it.

[17] THE COURT: Well, maybe you'd better take ten minutes for you to look at your notes.

THE WITNESS: All right.

THE DEPUTY CLERK: All rise. By order this Honorable Court stands recessed for ten minutes.

(Recess taken.)

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THE COURT: Do you have any more questions of the officer?

MR. BEIZER: I would like to ask him one question, Your Honor.

THE COURT: All right.

BY MR. BEIZER:

Q After Mr. Washington told you that he was not going to press charges and told you the story of the sequence of events of picking up the hippy-type fellow with the motorcycle, did he tell you anything further at that point?

A No, sir, not that I can remember.

Q And did your conversation end at that point or shortly thereafter?

[18] A Shortly after, yes.

Q And you in no way intended to arrest him or anything at that point?

A No, sir.

Q And when was the next time that you saw Mr. Washington?

A Today.

Q Today was the next time that you saw him?

A Yes.

Q You didn't see him at any time in between that meeting in December and today?

A No, sir.

MR. BEIZER: I have nothing further, Your Honor.

THE COURT: All right.

[CROSS EXAMINATION OF RALPH L. SNOOTS]

BY MR. CHERRIN:

Q How long have you been on the police force?

A I'm starting my fifth year.

Q How about with the Auto Squad?

A Going on two and a half years.

Q Two and a half years?

A Yes.

Q Before Mr. Washington was brought into your office, before he came to your office, had you had any knowledge of the statements that the other two gentlemen had made?

[19] A As I previously stated, if they made statements, they might have made them either before or after I was there, but they refused any statements to me whatsoever.

Q Did you talk to Officer DuRant before you talked to Mr. Washington?

A Before I talked to Mr. Washington?

Q Before you talked to Mr. Washington, did you talk to Officer DuRant about this case?

A Yes, I had to.

Q Did he tell you that they made any statements to him?

A I don't recall whether or not he mentioned it, whether they did or didn't. I don't know.

Q It is your testimony that you did not know when Mr. Washington came into your office that the two gentlemen who had been arrested had told Officer DuRant that Mr. Washington was their friend and they had permission to use the truck?

A I understand that Officer DuRant may have told me. I don't remember him talking me but he may have.

Q It is a possibility?

A Yes, sir, it's a possibility.

THE COURT: Anything is possible, Mr. Cherrin.

BY MR. CHERRIN:

Q You did talk to Officer DuRant to some extent about [20] this case?

A Yes, sir. I had to in order to ascertain the facts and, of course, we in the Detective Division try to assist the uniformed personnel in advising them of the proper charge and whatnot like this and, of course, I did discuss the case with him in order to determine what he had.

Q This was after. All right. When Mr. Washington first came into your office, and I'm going to ask you to sort of repeat what you said before but in a little more detail, when Mr. Washington first came into your office, what was the first thing you said to him, do you remember?

A I believe he came into the office and the secretary, I was at my desk, and the secretary told me that he was there and I went out and introduced myself and he introduced himself and we did casually sit down and started talking.

Q You told him that you were with the Auto Squad?

A Yes. I'm sure that he knew that he was in the Auto Squad. Of course, I left word when I went to the home that I was with the Auto Squad and, of course, there's a big sign that says, "Auto Squad", when you walk in.

Q Did you advise him of his rights at that time?

A No, sir.

Q Did you advise him of his rights at any time that day?

A No, sir.

[21] THE COURT: Mr. Cherrin, why?

MR. CHERRIN: Your Honor, I just want to make sure for the record whether he did or did not.

THE COURT: Well, it's a quarter of four and it's getting late in the day and this Court and the staff here haven't had any lunch today. We started at about quarter of nine this morning. So insofar as you are able to, please let's stay with relevant questions.

It is clear from the officer's testimony that anything said was non-custodial dialogue.

MR. CHERRIN: I won't burden the Court. I just wanted to establish it for the record. I apologize to the Court.

THE COURT: All right.

BY MR. CHERRIN:

Q All right. Then you told him, did you not, that his car, that his van had been picked up, is that right?

A Well, I first asked him about whether or not he owned the van and ascertained if he was who he said he was and I wanted to see some registration.

Q Now after he produced the registration and you were satisfied that it was his van, didn't you ask him whether he wanted to be the complaining witness in the case or whether he wanted to file a complaint, isn't that correct?

A I explained to him that these gentlemen had been [22] picked up in a truck and then I asked him whether or not, or questioned him to the fact whether or not he wanted to be a complainant, yes, sir.

Q And at that point he said no, that they were his friends, is that right?

A Yes, sir, I believe that that was his response.

Q Now can you tell us why you asked him more questions at that point?

MR. BEIZER: Your Honor, I'm not sure that he asked him any more questions.

MR. CHERRIN: I think from his testimony, Your Honor, he did go into the story—of course, I may be wrong as to the chronology.

THE COURT: What difference does it make as to why he asked him more questions? If you want to ask him if he did ask him more questions and what they were, go ahead and ask him. Why he asked them is totally immaterial.

BY MR. CHERRIN:

Q Did you ask him any more questions after he said he didn't want to be a complainant?

A I'm certain that I did. What the questions were I don't know because if I remember correctly, Mr. Washington sort of volunteered the story to me.

Q Now can you point out in that story—you testified that you thought the story was odd, is that correct?

[23] A That's correct.

Q You didn't believe the story, did you?

A After he had told me about the fact of him picking up this complainant and identifying the complainant and the motorcycle, yes, I thought that it was odd, yes, I did.

Q Did you tell him that you suspected that he was part of this deal?

A I believe the words were that I told him that I didn't believe his story and asked him if that was the truth and I believe that he responded that it was and I said, "Well, you shouldn't—I wouldn't go to court and testify to that fact because you're liable to be in trouble if you did."

Q You told him that?

A Yes.

Q All right. Now after he left, did you report this to somebody else—

A No, sir.

Q —this story? Do you know how it came about that he was subpoenaed to testify before the Grand Jury?

A I do not, sir.

Q You have no idea?

A No. As I stated to the State's Attorney, when he left my office, that was it. The only thing that I had in my mind and intention was to prove ownership and whether or not an additional crime had been committed by either, you know, [24] the two defendants that had been arrested and when he left my office that was the last time I seen him until today.

Q Well, did you proceed at all any further with the investigation of Mr. Washington?

A No, sir. I had no reason to.

Q The usual procedure, I believe you indicated, was to paper with regard to the other two, is that correct, as far as you knew?

A That is correct.

Q And you were in charge of that papering, is that correct?

A No, sir. Officer DuRant handled the case. As I also stated, I'm just, we're merely advisors as to the charges and assistants. In this particular case, my assistance was to find out who owned the vehicle, whether or not it had been reported stolen and, you know, whether or not he wanted to complain.

Q Who was in charge of the case?

A Officer DuRant.

Q Did you report to Officer DuRant the conversation that you had with Mr. Washington?

A I believe Officer DuRant called me the next evening and asked me whether or not I had gotten a hold of the owner of the truck and I stated that I had and that the man had shown me proof of ownership.

[25] Q Did you tell him the story that Mr. Washington had told you?

A I don't remember if I did or not. As a matter of fact, I don't even remember the officer calling but I'm sure he did because I don't think he knew Mr. Washington's address or name and I gave it to him.

Q Do you remember telling anybody Mr. Washington's version?

A No, sir, other than—I'm sure I told the officer. I just don't know at what point.

Q So after that, as far as you know, you did not work on the case?

A No, sir.

MR. CHERRIN: I have nothing further, Your Honor.

MR. BEIZER: One question by way of redirect.

[REDIRECT EXAMINATION OF RALPH L. SNOOTS]

BY MR. BEIZER:

Q Officer, was Mr. Washington's truck impounded as the result of the events on December 3rd, that is, the motorcycle being inside, if you know?

A If I remember correctly, the truck was seized as evidence.

Q It was seized as evidence. And you did not give it back to him, give him the property, when you saw him on this next day or the day after, is that correct?
[26] A No, sir. I had nothing to do with the impoundment of the truck. It was Officer DuRant's case.
MR. BEIZER: Thank you very much.
THE COURT: All right. Step down, sir. You are excused if you would like to be.
THE WITNESS: Thank you, Your Honor.

(Witness excused.)

* * * *

[DIRECT EXAMINATION OF RALPH DURANT]

BY MR. CHERRIN:

[27] Q Will you state your name for the record, please, Officer?
A Officer Ralph DuRant, assigned to the Second District Headquarters.
Q I call your attention to December 3rd, 1972. Where were you assigned at that time?
A We were assigned at 2D1, Scout 78.
Q And did you make an arrest on that night of a Samuel Zimmerman and Ruben Woodard?
A Yes, I did.
Q Will you tell us the facts of that arrest?
A Yes, sir. I observed a white van truck parked in the 3000 Block of K Street. It had two subjects standing in front and as we passed the vehicle the subjects got into the van and made a U-turn and went up 31st Street in the 1000 Block and so I likewise made a U-turn and stopped the subjects for questioning at which time I noticed a motorcycle laying [28] in the back of the truck and I got a check on it and found out that it was stolen. It had been stolen forty-seven minutes earlier. That's when the lookout came. So they were subsequently arrested and transported to 2D1 by Wagon 21 and they were advised of their rights on the scene and at the station.

Q Now when you stopped them, did you ask them, these two gentlemen, about the motorcycle?
A Yes, sir. I asked Mr. Zimmerman.
MR. BEIZER: Your Honor, I suggest that any further inquiry as to what happened to the other two gentlemen has no relevance with respect to whether any statements were taken by Officer DuRant from Mr. Washington.
THE COURT: Answer the question.

BY MR. CHERRIN:

Q Thank you. Did they make any statements as to the motorcycle?
A Yes, sir.
Q What were those?
A Mr. Zimmerman said that he thought it belonged to Mr. Washington.
Q He gave you the name of Washington?
A He said the owner of the truck.
Q And he said that he believed that that motorcycle was owned by Mr. Washington?
A Right. The owner of the truck is what he said. He [29] didn't say Mr. Washington.
Q Were there any other statements made to you about the motorcycle or the van?
A Not at that time.
Q Well, at a later time were there any statements made to you?
A At the station I found out who the truck was registered to, and I tried to get in touch with him and failed to do so. He wasn't at home.
Q Well, did Mr. Woodard or Mr. Zimmerman make any statements?
A Mr. Zimmerman said that Mr. Washington had called him and told him to come pick up his truck, that it had broken down somewhere, I believe he said, at 29th and K somewhere around there.
Q When did he make that statement?
A While I was processing the papers.

Q Now at a later time I believe you had a conversation with Officer Snoots?

A Snoots.

Q Right.

A The same night I talked to Officer Snoots, right.

Q Did you tell Officer Snoots what statements Mr. Zimmerman or Mr. Woodard made?

A They were on the scene at the time as I was doing [30] the processing.

Q Officer Snoots was there?

A Yes, sir. Not for the entire period but for enough time to get the information as to the gentlemen's identity.

Q Were you present at the station when Mr. Washington came down to talk to Officer Snoots?

A No, sir, he didn't talk to him at 2D1. I believe he talked to him down at headquarters.

Q And you were not present?

A No, sir.

Q Did there come a time when Officer Snoots informed you of the conversation he had with Mr. Washington?

A I believe several days later I called. I'm not too sure if I called him or he called me and I'm not too sure of what he said at this time.

Q Well, did what he said to you lead you to have Mr. Washington subpoenaed for the Grand Jury?

A No, sir. I didn't have him subpoenaed. The U. S. Attorney had him subpoenaed.

Q Do you have any knowledge of why the U. S. Attorney had him subpoenaed?

A I believe it was to give a statement about his truck at the time.

Q Did he give the U. S. Attorney any information about the case?

[31] A When I went down to the Grand Jury to process Mr. Zimmerman and Mr. Woodard, I told them who the owner of the truck was and it was on the statement as to what they said about the truck and everything and that was it.

Q Were you aware at that time of the statements that Mr. Washington had made?

A No, sir, not at that time.

MR. CHERRIN: I have no further questions.

THE COURT: Any questions?

MR. BEIZER: I have no questions, Your Honor.

THE COURT: All right. You may step down, Officer. Thank you. You may be excused.

(Witness excused.)

THE COURT: Mr. Cherrin, what have you got to say, sir?

MR. CHERRIN: Pardon?

THE COURT: I say, what have you got to say? What statement is it, or are there, that you desire to have suppressed?

MR. CHERRIN: Well, Your Honor, the statement said at or that Mr. Washington made at the police station to Officer Snoots.

THE COURT: Are you going to put him on the witness stand?

MR. CHERRIN: No, sir, not at this time. There was [32] no arrest made at this time though I think it is clear from what the officer said that there were some suspicions about Mr.—

THE COURT: He told him after he heard his story about picking up a hippie-type individual and putting a motorcycle in his truck, he said, "I don't believe that story and all you're going to do is to get into trouble if you go down to court and tell that to anybody," and then he said after that he didn't do a thing and had nothing to do with this case thereafter and hasn't seen the man until today.

MR. CHERRIN: I understand that, Your Honor. That is his testimony. First of all, Officer DuRant testified that on the night of the arrest of the other two gentlemen, Mr. Woodard and Mr. Zimmerman, that they made a statement to the police saying—

THE COURT: Made a statement to him.

MR. CHERRIN: Right, made a statement to him.

THE COURT: Yes, to him, Officer DuRant.

MR. CHERRIN: Yes, to Officer DuRant and I asked him, and I think his answer was, that Officer Snoots was there,—

THE COURT: He said he was there part of the time.

MR. CHERRIN: Right. And that was in answer to my question whether he told Officer Snoots the statement and I inferred that Officer Snoots was aware of that statement [33] and that at that time Mr. Washington was under some suspicion. Now the police may not have had probable cause at that time to make an arrest.

THE COURT: When he became under suspicion, if it's appropriate to say that Officer Snoots suspected him of anything, and quite clearly he only talked to Officer Snoots, he didn't talk to Officer DuRant and you're not seeking to suppress anything he said to Officer DuRant but you're seeking to suppress whatever he might have said to Officer Snoots, and as soon as he said it to Officer Snoots, Officer Snoots said that a statement like that "is just going to get you in trouble and I wouldn't go around, go down to Court and tell the people about it," and with that, the conversation ended and your client went his way and the officer went his way and nothing else was ever done.

MR. CHERRIN: Well, Your Honor, something else was done. He was subpoenaed to come down to the Grand Jury.

THE COURT: Not by Officer Snoots. Just a minute, Mr. Cherrin, as I keep saying, it's getting late. I'm trying to point out to you that you're saying, and you agree that it was not custodial interrogation, and if you agree with me that he was not a suspect, if you want to call him a suspect, until such time as the officer said to him, "I don't believe that story and you'd better not go around telling anybody about it because it's going to get you in trouble," [34] after that, nothing more was said, and so if he were a suspect at that time and you choose to call him as a suspect at that time, he was not thereafter questioned by Officer Snoots. Let's move on. Your motion to suppress the statements that he made

to the police for whatever inculpatory merits there may be to them, and I'm not sure that there is, that motion is denied.

MR. BEIZER: May we proceed, Your Honor, by calling Mr. Richard Stuckey.

THE COURT: You call whoever you wish.

MR. BEIZER: I would like to call Richard Stuckey.

* * * *

[DIRECT EXAMINATION OF RICHARD STUCKEY]

BY MR. BEIZER:

Q Mr. Stuckey, in a loud clear voice, will you state your full name, please?

A Richard N. Stuckey, S-t-u-c-k-e-y, Assistant United States Attorney, Office of the United States Attorney, Washington, D. C.

Q Which division of that office do you work in at present?

[35] A The Grand Jury Intake Section. Specifically, I'm assigned to the operation of the Grand Juries in the Superior Court.

Q Will you take a look around the courtroom now and see if you can identify anyone you have seen prior to today in the court with the exception of His Honor and the people in back of you?

THE COURT: With the exception of everybody but the defendant.

MR. BEIZER: Yes, Your Honor. Briefly, that is what I'm asking him. Mr. Stuckey, have you seen the defendant before?

THE WITNESS: Well, I know that I have by virtue of the names in the case. I don't really recognize the gentleman although he is about the same size and appears to be a person who came to me one morning or at noon as I remember it in the office of the Grand Jury in the basement of this building, however, I cannot say, because it has been sometime, that I do actually recognize him.

I do know that he is the defendant in this case and through examining the records realize that he is the person who came to me on this date and to whom I gave a subpoena after a certain conversation.

BY MR. BEIZER:

Q Do you remember what date that was?

[36] A No, I don't. I have looked at the records and the jacket and my recollection is sometime between November and March but I don't remember the day.

Q Did you have any conversations with anyone concerning Mr. Washington prior to his coming down and you seeing him in the Grand Jury room?

A Is that the defendant's name, Mr. Washington?

Q Yes, Mr. Washington is his name and that is the defendant.

A I'm sorry. What was your question?

Q Did you have any contact with him or hear anything about him prior to his coming to the Grand Jury the day that you saw him?

A No. He came to our office and I believe our receptionist brought him to my attention. He had a request for the return of a vehicle. I didn't know about the case, didn't know anything about the case, and I remember that I had to talk to him for a brief moment to find out what the case was about. I find out the name of the person arrested and I believe right at that moment I went and retrieved the jacket from our card file which would indicate on what date the case was set for the Grand Jury hearing, pulled the jacket out, and then looked over the jacket and discussed with him his problem.

Q What was the problem?

A He wanted his vehicle back. The vehicle had [37] apparently been impounded or kept by the police after it was found, it being some sort of a van truck, I believe, with a stolen motorcycle in it or close to it or something, and two things dawned on me as I looked at the case, one, probably or apparently the vehicle was not needed as evidence and we wouldn't have any real right to not say to him and give him a piece of paper form

which says, "This vehicle may be released and is not needed by the U. S. Attorney's Office for evidentiary purposes," which form goes to the property clerk, and, secondly, it dawned on me that he would be a witness or should be a witness in the case against—at that time I forget who it was against but he had had some contact with persons, to my recollection there were two people, who had been arrested.

Q Did you serve him with a subpoena at that point?

A I remember serving him with a subpoena. What I independently try to recall is that I couldn't recall that I had served him with a subpoena and gave him the property release. It was my recollection that I had served him with a subpoena and denied him a property release stating that we had to wait until the date when the case came before the Grand Jury and when all parties were there and when an Assistant could sit and go over all the facts to see if the vehicle could be removed, but I note an entry which I had made on the jacket at that time that apparently I did give him the vehicle back, and from that I would know now that I decided that the vehicle [38] was not needed for evidentiary purposes and that he need it. I remember that.

Q Did he explain to you what the circumstances were regarding that vehicle on that evening that it was seized?

A Yes. I asked him some questions and he gave me an explanation.

Q And at that point you served him with a subpoena, is that correct, or shortly after that you served him with a subpoena?

A I did. I think I might have even told him, of course, that he would be needed as a witness and I would give him a subpoena. I had some doubt in my mind about whether he would return voluntarily I remember and so I wanted to serve him with a subpoena.

I think I also told him that it would be necessary, not that it would be necessary, but that when he came that he would be entitled to a $20.00 witness fee but, of course, this is supposed to be prefaced with the service of a subpoena so that the man—right and proper I gave him a subpoena—but I wanted him back on the day it

was set for the Grand Jury proceeding. I did not have time to go into all of it at that time. Of course, the police officer wasn't there and the other witnesses weren't there.

Q After he related to you the circumstances of how his truck came to be impounded, did you question him any [39] further about that at that time, if you can recall?

A He told me the circumstances under which his truck got impounded. I think that was evidenced from the jacket. Yes, I did question him generally about the whole matter but it was difficult.

I remember I was rushed and it was difficult for me to see exactly what was up as far as the case was concerned.

Q Can you tell His Honor what your purpose was in serving him with a subpoena?

A To have him there as a witness so that we could resolve the whole matter. I could see that it was a circumstantial case in some aspects and there was some problem with the people charged or getting an indictment and successfully prosecuting them if they were the guilty parties because the motorcycle, if that's what it was, apparently was in this man's van.

MR BEIZER: I have no further questions, Your Honor.

THE COURT: Well, I have a question.

You served him a subpoena the day that he came to talk to you to come back another day to testify before the Grand Jury?

THE WITNESS: Yes, the day, Your Honor, for which the case was scheduled for Grand Jury presentment as I recall.

THE COURT: All right. Now if you will just step [40] down from the stand, we will take the verdict in another case.

(Whereupon the witness stepped down from the stand and the Court heard another matter totally unrelated to the case at Bar, after which the witness resumed the stand and testified further as follows.)

MR. BEIZER: I have no further questions, Your Honor.

MR. CHERRIN: I have a few questions.

THE COURT: All right.

[CROSS EXAMINATION OF RICHARD STUCKEY]

BY MR. CHERRIN:

Q Do you remember exactly what Mr. Washington said to you?

A No, sir, not exactly.

Q Did you remember that you had some doubts about the story?

THE COURT: Why don't you ask him, did he have any doubts about his story.

MR. CHERRIN: I thought I did, Your Honor.

THE WITNESS: I can remember. Yes, I did.

BY MR. CHERRIN:

Q Do you remember what those doubts were?

A Essentially, I can't be specific, but essentially, and I think I might have voiced these to him at the time that it didn't make sense. I think he stopped to pick up the [41] people who had the motorcycle according to him who had some problem with the motorcycle, put the motorcycle in his van and then his van had some trouble and he left his van to go to a gas station or repair shop to get help but left his van completely in the custody of these two people whom he hadn't even known before whose motorcycle was in the back.

It was truly a Good Samaritan act on his part and an indication of great faith in human nature if it were accurate, but it didn't seem to me that it would be, and so that is what raised the doubts.

Q Did you confront him with those doubts?

A I think I did. I think I said, "Now, is that true?" or "Could that be right?" or "Why did you leave?" or ask some questions of that nature but I didn't push it to a final answer. I didn't have time for it, I remember.

Q In any event, you decided that you still had doubts, is that right?

A That would be accurate, yes.

Q You also said that you had doubts about his returning voluntarily. What was the basis for those doubts?

A Well, it seemed to me that—I can't remember now—but in putting it together I can see that I did give him the property release. He had his vehicle back. He didn't have any particular reason to come and testify if these people were friends of his and he wasn't telling me about it that he had [42] stopped or if he made friends with them and stopped, why would he want to come back and testify against them in essence. We have that great running problem with witnesses who do not wish to testify against people that they have become associated with.

In addition, if there was something that he wasn't telling me, of course, he didn't want to come back and would not theoretically want to come back and get in the middle of that tightening noose of evidence which would come from other witnesses and the police officers.

Q Was the basis of your doubts that you had with his story why you issued the subpoena for him?

A I would say that would be an accurate statement of my motivation in giving him a subpoena as opposed to just saying, "Okeh, now look, my man, I'm going to take your word if you'll be back on such and such a date, all right," and try to establish a little rapport with him and get his assurance that he would voluntarily return.

I would say that your question accurately stated my motivation.

Q One other question. You, I gather, question people before the Grand Jury, is that not correct?

A Yes.

Q And do you normally give the Grand Jury witnesses any type of warning?

[43] THE COURT: I'll sustain the objection to what normally happens. I'm only concerned with what happened here, Mr. Cherrin.

MR. CHERRIN: Well, I think it's relevant.

THE COURT: I sustained the objection. Ask your next question.

MR. CHERRIN: I have no further questions, Your Honor.

THE COURT: Anything further?

MR. BEIZER: Nothing by way of redirect.

THE COURT: Thank you very much.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

* * * *

[DIRECT EXAMINATION OF RICHARD SHINE]

BY MR. BEIZER:

Q Will you tell His Honor in a loud and clear voice your full name and occupation?

[44] A My name is Richard Shine, S-h-i-n-e. I'm an Assistant United States Attorney.

Q Where are you assigned in the United States Attorney's Office? I take it that would be in the Washington United States Attorney's Office?

A Yes, in the District of Columbia. At the present time I'm assigned to the Grand Jury Section of that office.

Q In the Superior Court?

A That is correct.

Q Were you assigned there on February 5, 1973?

A That's correct.

Q On that day, do you remember seeing Mr. Gregory V. Washington that is seated here in the courtroom to the left of Mr. Cherrin, the man with the beard?

A I did see a gentleman, Gregory V. Washington. I think that's Mr. Washington. I can't positively identify him.

Q What was your contact with Mr. Washington at that time on that day? Had you seen him before?

A Before that day?

Q Yes.

A I don't believe so.

Q What was your contact with him on that day?

A He came in pursuant to a subpoena that I had signed and testified in front of the Grand Jury that day.

[45] Q Did you have any conversation with him prior to him going before the Grand Jury, to the best of your recollection?

A Are you referring to the warning of his rights? Is that what you're referring to?

Q I just asked you if you had any conversation with him?

THE COURT: More specifically with respect to warning him of his rights, yes.

Before he went into the Grand Jury, did you inform him of his rights and get a written waiver from him, a written waiver of Fifth Amendment rights?

THE WITNESS: Prior to going to the Grand Jury?

THE COURT: Yes.

THE WITNESS: I did not get a written waiver. I'm fairly sure of that.

Judge, I don't have an independent recollection of whether I first had Mr. Washington in my office and warned him of his rights that he waived and then I brought him down to the Grand Jury. I would say this though. I spoke to Officer DuRant and his recollection is that it was only after we were down in the sub-basement where the Grand Jury rooms themselves are and while he was sitting outside the Grand Jury rooms themselves that I asked him for a warning-of-the-rights card.

[46] Now from that I would infer that since I did not have a card when we were down, or already have a card when we were outside the Grand Jury rooms themselves, I would infer from what Officer DuRant recalled that I probably did not warn him of his rights in my office and that the first time that I warned him of his rights was in the Grand Jury room itself and on the record.

BY MR. BEIZER:

Q Do you remember the substance, if at all, of the conversation that you had with Mr. Washington in your office?

A No. I think if that is what happened, if I only warned him of his rights for the first time in the Grand Jury, what I would have done is picked up our jacket and in the jacket there was a Grand Jury summary that the secretary had already typed and I would have read that to get some idea of what Mr. Washington's story was and then just put him in the Grand Jury without having any lengthy conversation with him, or if any conversation at all.

Q Now, did there come a time when you actually did put him before the Grand Jury?

A Yes, indeed.

Q And did you advise him of his rights there?

A Yes, I did, and we did that on the record and it was in the Grand Jury that I gave him the PD 47, the warning-of-the-rights card, and he executed the waiver after I warned [47] him orally of his rights. He executed the waiver on the back of the PD 47.

MR. BEIZER: Your Honor, could I have Exhibit No. 1 to refresh Mr. Shine's recollection of what was stated as part of the record since that is sworn testimony and let's take that as part of the record as to what actually Mr. Shine said when he warned him of his rights?

THE COURT: Do you have any doubt about this being the actual transcript?

MR. CHERRIN: No, I don't, Your Honor.

THE COURT: All right. The Grand Jury testimony insofar as the warning of his rights is concerned will be received into evidence.

(Whereupon the Grand Jury transcript was marked Government's Exhibit No. 1 and received in evidence.)

MR. BEIZER: I would also like to have this marked as Government's Exhibit No. 2, if I could, just for the purposes of this motion.

THE COURT: It will be so marked.

(Whereupon a Police Department Form 47 was marked for identification as Government's Exhibit No. 2.)

[48] BY MR. BEIZER:

Q Mr. Shine, I show you what has been marked as Government's Exhibit No. 2 and ask you if you can identify it?

A Yes. I believe this is the card, in fact, I'm fairly sure that this is the card that in the Grand Jury I had Mr. Washington read the questions and fill in the answers. This is in his handwriting and he signed, Gregory Washington. He dated it, I think he dated it, and the signature as a witness is the Court Reporter whom I had, the Court Reporter in the Grand Jury, Katherine Mooney, whom I had witness this.

Q Were you present when that happened?

A Yes. I handed him the card while he was sitting in the witness stand.

Q And did you see Mr. Washington make these responses and see Mrs. Mooney sign as well?

A Yes. I believe that I briefly read part of the transcript of the Grand Jury testimony and I believe there is some discussion on the record which indicates the process of his executing the waiver of the rights card.

Q Thereafter after advising Mr. Washington of his rights, did you prior to that time find out how old he was? Did you have any suggestion of how old he was?

A Unless it was some place in the DA's jacket I have no independent recollection of asking him how old he was. He appeared to me to be an adult.

[49] Q Did he appear to answer your questions, the questions that you put to him, was he responsive to those questions?

A You mean as to the warning of his rights?

Q As to the warning of his rights?

A Yes.

Q And you perceived no difficulty in him in that he had not understood you in any way when you were advising him of his rights, is that correct?

A No. I thought and my impression was that he very clearly understood what I was saying and indeed I asked him, "Do you understand?" and he said, "Yes."

Q After that, did you proceed to question him about the incident involving the truck and motorcycle?

A Yes. After he had waived his rights on the record and then signed a written waiver on back of the PD 47 I then proceeded to ask him about the circumstances of how his truck got involved, you know, with a stolen motorcycle.

Q Other than Grand Jury members, yourself, Mr. Washington, and the Court Reporter, was there anyone else in the Grand Jury at the time?

THE COURT: Twenty-three people with the exception of those that might be absent.

THE WITNESS: I think the question was, other than the Grand Jury. No, there was no one other than the Grand Jury, the Court Reporter, myself and the witness present which [50] is, as you know, required by law.

BY MR. BEIZER:

Q Did Mr. Washington continue to answer your questions throughout the course of the examination or did he at any time indicate a reluctance to answer these questions.

A He at no time indicated any reluctance whatsoever.

Q And did he respond to your questions in a responsive manner and did he appear to have understood what you were asking him?

A Yes, and the questions of the Grand Jurors as well.

Q And he did not appear to have any difficulty in comprehending them?

A None whatsoever.

Q After the time he finished his testimony, what happened?

A I asked him to step outside. After the conversation I had with the Grand Jury I stepped outside the Grand Jury room and excused him.

Q You had no further conversation with him after those proceedings?

A No. I have not seen him since then, seen him since that occasion. I have not.

MR. BEIZER: I have no further questions, Your Honor.

THE COURT: Mr. Cherrin.

[51] MR. CHERRIN: May we approach the Bench for a second, Your Honor?

THE COURT: There is no jury here. Must you come to the Bench?

MR. CHERRIN: Well, I want to ask a question which I asked before on which the Court sustained or held that—

THE COURT: Come to the Bench.

(Whereupon counsel for the Government and counsel for the Defendant approached the Court at the Bench at which time the following colloquy was held in a low tone of voice.)

MR. CHERRIN: I just want to ask the question as to what the usual procedure is. I think it is relevant to show that they did consider Mr. Washington a suspect, Your Honor.

THE COURT: What difference does it make? I'm only concerned about what the law is and what they did with this man. Now what they do in ninety-nine other cases—

MR. CHERRIN: I think it is relevant to show that he was a suspect—

THE COURT: Mr. Cherrin, you have a happy facility of talking when I'm talking.

MR. CHERRIN: I'm sorry, Your Honor.

THE COURT: Again, I'm only concerned with this case. What they did in ninety-nine other cases, or a hundred and ninety-nine other cases, seems to me to be totally [52] immaterial.

I'm concerned, Number One, what is the law, is PD 47 sufficient for a lawyer in the Grand Jury, and alternatively if it is not, what more is required, and what the United States Attorney's policy is or might be is not material or relevant so far as I can see.

MR. CHERRIN: I won't quibble with the Court. I only offer that to show that you may indeed consider Mr. Washington a suspect in this case.

THE COURT: You can bring that out in testimony that he was.

MR. CHERRIN: In some other cases they may not advise a person of their rights but in this case they did and I think that that is an indication that he was a suspect.

THE COURT: Well, you can ask him this whether it's the practice to warn all witnesses or people who may be involved.

MR. CHERRIN: That's all I want to ask him.

THE COURT: You can ask him that. All right.

MR. CHERRIN: Thank you, Your Honor.

(Whereupon both counsel resumed their places at the counsel table, after which the following occurred.)

[CROSS EXAMINATION OF RICHARD SHINE]

BY MR. CHERRIN:

Q Mr. Shine, were you aware of any statements that [53] Mr. Washington had made to either members of the Metropolitan Police Department or other members of your office before he was brought in?

A I believe I was, that is, the notes on the back of the DA's jacket were made by, I believe, Mr. Stuckey.

Q Is that your own only knowledge of any prior statement? Did Officer DuRant tell you anything as to what Mr. Washington might have said?

A I honestly do not have any independent recollection of whether he did or not.

Q But you do remember looking at the DA's jacket?

A Yes, I would have looked at the notes on the back of the DA's jacket.

Q Now I believe Exhibit No. 1 is the first full three pages of his Grand Jury testimony and in which you advised Mr. Washington of certain rights.

Is there any other time that you advised him of any rights?

A I don't understand what you mean. You mean while I was in the Grand Jury room?

Q Right.

A No. Everything—whenever a witness is in the Grand Jury room we are always on the record and I never go out the record, so that transcript would accurately reflect the extent of my warning him of his rights in the Grand Jury room.

[54] Q Very well. The usual practice is to advise a person of his rights whenever he testifies in front of the Grand Jury?

A You mean any witness who comes in?

Q Any witness?

A No, sir.

Q Will you tell us why you advised Mr. Washington of his rights?

A Because at the time I had read the notes on the back of the jacket as indicated by Mr. Stuckey. I wonder if I might see the notes.

Q I have no objection.

MR. BEIZER: I have no objection, Your Honor.

(Whereupon a document was handed to the witness by Mr. Beizer after which the following occurred.)

BY MR. CHERRIN:

Q Are those the notes that you're referring to?

A Yes. This is on the left side of the back of the DA's jacket which is labeled, Samuel Lee Zimmerman, the case of Samuel Lee Zimmerman, and it's in a column under AUSA notes.

Q So it was then based on your own notes when you advised Mr. Washington of his rights?

A Well, let me explain what I mean. I read those notes and it seemed clear to me that according to Mr. Stuckey's recollection of his conversation with Mr. Washington that [55] Mr. Washington was telling Mr. Stuckey that the two men who were arrested in the truck were not the persons who had the truck when the stolen motorcycle was put into the truck, and at the same time Mr. Washington was in effect saying to Mr. Stuckey, as I interpreted these notes, that Mr. Washington did not know the motorcycle was stolen at all, that is, stolen at the time it was put in his truck either.

If that story were to be believed by the Grand Jury, then he, of course, would be guilty of no offense nor would the two men who were arrested in the truck.

My reaction to that story was that "I'm not sure whether the Grand Jury is going to believe it," and so as a matter of precaution I just thought that I would be overly cautious and warn him of his rights before he testified.

Before I put him in the Grand Jury and was able to in detail question him about the circumstances of how he became in possession of the truck, I did not know whether his was a believable story that he did not know that the motorcycle was stolen and was put in his truck and nor therefore did the two men who were arrested later in possession of this truck and the motorcycle, and so as a matter of precaution and not because I had any belief at that time that he was confessing to any offense, but as a matter of precaution, I decided to warn him of his rights.

Q And so you then envisioned the possibility that the [56] Grand Jury may indict him on this charge, is that right?

A I thought that the Grand Jury might conceivably disbelieve him and decide that when he took, if he admitted that he took possession of the motorcycle while he was in possession of the truck that they could decide to indict him. It would be a matter for the community, that is, the Grand Jury.

Q From the story that you knew or the statement that you knew that he had already made you thought there

was a possibility? If he had given the same statement which he had previously given to Mr. Stuckey, you knew there was a possibility that he could be indicted?

A Yes, of course. That's why I warned him of his rights. What I'm saying to you is that I had not decided, I in my own mind as a prosecutor had not decided, that this man was going to be indicted. He had an explanation about how the motorcycle got into the truck which might result in all three men, himself and the other two men, being ignored by the Grand Jury and the whole matter being closed.

On the other hand, I was interested in presenting the whole matter to the Grand Jury so they could decide whether to ignore all three men or indict the two men who were arrested in possession of the truck or indict Mr. Washington by himself or do what they chose on whatever they decided to believe having heard the testimony of Mr. Washington.

[57] Q Did you have any knowledge of any doubts that Mr. Stuckey may have had as to Mr. Washington's story?

A No. I don't believe I talked to Mr. Stuckey before I put him in.

Q Had you had any doubts before Mr. Washington began his testimony?

A I had no idea, sir. I had not closely questioned the man about his explanation. I didn't know until he started testifying as to what his explanation was going to be.

Q You did talk to him before he went into the Grand Jury room?

A About the substance of what happened?

Q Yes.

A No. I don't believe that I did. That's why I indicated to you if I had talked to him at length in my office about what happened, I would have warned him of his rights in my office but it is my best recollection that I don't have an independent recollection of warning him and I don't think, based upon what Officer DuRant indicated, I don't think I did talk to him in my office.

MR. CHERRIN: I have no further questions.

THE COURT: Why would you have warned him of his rights in your office if you were going to do anything in the Grand Jury room anyway?

THE WITNESS: Well, Your Honor, because, and I [58] think in this case as the Court knows there are a number of cases that we are processing through the Grand Jury every day, but I think what happened, this is my thought-process in this case, was that I just brought him into the Grand Jury and after I brought him in I thought to myself, "Well, maybe as a matter of precaution I had better warn him of his rights."

Ordinarily if a man has come to me and clearly indicated, or I have a clear indication that he is going to admit to me a criminal offense, what I will do first as a matter of routine, is to talk to him in my office and advise him of his rights and if he decides that he is not going to testify, then I don't put him in front of the Grand Jury.

THE COURT: Why don't you wait until you get him in front of the Grand Jury and do that?

THE WITNESS: Well, because as a general rule, in my opinion, it is an improper inference and if a man goes into the Grand Jury and takes the Fifth Amendment in front of the Grand Jury, the Grand Jurors will have a tendency to draw an improper inference from that fact.

THE COURT: So that under the circumstances it ought to be done before it is done in the Grand Jury, is that what you're saying?

THE WITNESS: If I have some reason to believe that the man is in fact going to take his Fifth Amendment right.

THE COURT: Is the fact that you did not understand [59] or you didn't know when you started off and asked him his name and address, and the second question, "Sir, is that an apartment or a house?" and the third question, "Before I ask you any questions. You're here under subpoena, is that correct?" why did you ask him that?

THE WITNESS: To make it clear to protect his rights and clear in the record that he did not voluntarily come in.

THE COURT: And then the next question was, "Before I ask you any questions I have to tell you what your rights are."

THE WITNESS: That is correct.

THE COURT: Now that took all of ten seconds to recognize that you had to tell him of his right.

Now, where did you suddenly gain the knowledge or the understanding that you had to tell him of his rights when you didn't know that you should have told him of his rights before he came in?

In other words you say. "Mr. Doorman, call the next witness," or whoever it is and he goes and brings him in and he is sworn in the Grand Jury room, is that not so?

THE WITNESS: That is correct.

THE COURT: Then you say, "Sit down, sir," and then he sits down and you say, "What's your name and where do you live?" and then he tells you and you say, "Is that an [60] apartment or a house?" and then he tells you, and then you say to him, "Before I ask you any more questions I have got to tell you about your rights."

Now, where did you suddenly get the knowledge and the understanding or what information came to you at that time that was not available to you prior to the time that you brought him into the Grand Jury that made you aware of the fact that you now ought to warn him of his rights?

THE WITNESS: With all deference to the Court, Your Honor, I think you got the sequence of events wrong.

The witness—ordinarily I call the witnesses—I don't have a Sergeant-at-arms call witnesses. I ordinarily call them myself, but what happened is that I opened the door.

I explained to the ladies and gentlemen of the Grand Jury what the case was about. I opened the door and

asked Mr. Washington to step in. Nothing has been said up until this point.

It may well be that in this case it was at that point that I decided that I had better warn him of his rights. I stepped out while he's going into the Grand Jury room to get the card from the officer, go into the Grand Jury room, and then as soon as we start talking—

THE COURT: Why didn't you step him out of the Grand Jury room and warn him of his rights outside before you [61] brought him into the Grand Jury room?

THE WITNESS: Well, because I just didn't think it was necessary, Your Honor. I thought it in terms of that it was on the record, it was going to be on the record, and if the man said nothing, it was going to be on the record, and if the man said nothing, if the man took his Fifth Amendment right, there is no way that the Grand Jury was going to indict him because we couldn't, we had no evidence against him.

THE COURT: Mr. Shine, do you have up in your Grand Jury Section waiver forms that you have people that are questionably suspect and are going to testify before the Grand Jury that you have them execute before you take them into the Grand Juries and keep them as a matter of record?

THE WITNESS: Other than the PD 47?

THE COURT: Do you have such a form,—

THE WITNESS: No, Your Honor.

THE COURT: —a waiver of Fifth Amendment privilege form?

THE WITNESS: No, Your Honor.

THE COURT: You don't have such a form?

THE WITNESS: No, Your Honor. I use the PD 47 supplied by the police officer.

THE COURT: No, I'm not talking about that. The PD 47 is a warning.

THE WITNESS: I see.

THE COURT: And then on the other side is the—

[62] THE WITNESS: The waiver.

THE COURT: The waiver where they sign it.

THE WITNESS: That's the only waiver I use.

THE COURT: And other than that, you don't have any?

THE WITNESS: No. That's the only waiver I use, Your Honor.

THE COURT: All right.

Anything else, Mr. Cherrin?

MR. CHERRIN: I have no further questions.

THE COURT: Do you have any questions?

MR. BEIZER: Nothing further from the Government, Your Honor.

THE COURT: Let me ask you something, Mr. Shine.

The PD 47 is designed for the police officer when he arrests a person on the street, is it not?

THE WITNESS: Yes, I believe that is correct.

THE COURT: And it is designed to satisfy what the Supreme Court of the United States said in *Miranda* that police officers shall from henceforth warn a man that he has got a Fifth Amendment right and that he doesn't have to talk and if he does, he can start, and if he wants to stop, he can, and if he wants a lawyer, he's entitled to a lawyer, and even if he starts talking and then decides he wants a lawyer he can stop and get a lawyer at that time, isn't that so and [63] isn't that what the PD 47 is designed to accommodate?

THE WITNESS: Indeed it is, Your Honor, and when I was in the General Counsel's Office of the Police Department at that time there was no waiver provision on the back and it was through my efforts that we put the waiver provision on the back.

THE COURT: It's seldom used by the Metropolitan Police Department.

THE WITNESS: Well, it's fortunate they haven't destroyed the old one

THE COURT: Let me ask you this. Do you discern any difference in the law between the requirement what a police officer must say to accommodate Fifth Amendment privileges and what an Assistant United States Attorney, a lawyer should say on Fifth Amendment privileges when he is presenting the case in the Grand Jury and he has got somebody that might be a suspect?

THE WITNESS: No, Your Honor. I think legally the requirement is the same as the warning and waiver of the rights.

THE COURT: Well, let me ask you this. The waiver has to be intelligent, does it not?

THE WITNESS: That is correct.

THE COURT: And if it is not an intelligent waiver, it is not a waiver at all.

[64] THE WITNESS: Yes.

THE COURT: Now, can you read the first, I guess, two pages in which you informed him of his rights and tell me what it is that you said in there that satisfied you that this man made an intelligent waiver under his Fifth Amendment right not to talk before the Grand Jury in which you acknowledge as kind of an intimidating atmosphere that you think it's improper to do it in there because it's coercive?

THE WITNESS: No, I didn't say that, Your Honor.

THE COURT: What is it that you said about doing it in the presence of the Grand Jury? Didn't you say it was coercive?

THE WITNESS: No, I did not.

THE COURT: Well, that it kind of might stigmatize the individual and the Grand Jury might hold it against him if he refuses to waive and then doesn't answer?

THE WITNESS: What I was saying, if Your Honor please, was that in a case in which the Grand Jury has heard evidence against a man, independent of what the man has said, sufficient that they could indict him, it would be improper for me to bring that man, particularly if he is already charged, but that wasn't the case here, but particularly if he was already charged, bring him in front of the Grand Jury and warn him of his rights as we could with any defendant who is charged in this Court and have him take his Fifth [65] Amendment rights in front of the Grand Jury because there would be no purpose in doing that other than having the Grand Jury draw an improper inference from it and not that it is coercive, but that the Grand Jury would improperly infer that if the guy is taking the Fifth he must be guilty, which, as the Court knows, is irrelevant

to the taking of the Fifth. I did not in any way say that I thought it was coercive to have the man come into the Grand Jury and be warned of his rights in front of the Grand Jury.

THE COURT: All right. Answer my other question and examine what you said to him in the Grand Jury before you started questioning him that would lead you to conclude on the basis of what you said resulted in an intelligent waiver of his Fifth Amendment rights before that Grand Jury?

THE WITNESS: I asked him after I read him what his rights were, I asked him on what appears to be line 14, "Now, do you understand those rights, sir? and he said, "Yes, I do," in his answer on line 15.

Then I said in line 16, "And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?" and he said, "Yes, sir."

And then I asked him on line 20, "And do you want a lawyer here or outside the Grand Jury room while you answer those questions?" and his answer was, "No, I don't think so."

Then I said, "Okay, sir—" and that's when I had [66] him fill out the rights card on line 23.

THE COURT: Didn't it matter to you how far he went to school?

THE WITNESS: Well, let me—

THE COURT: And I'm talking about you as an attorney instead of running a Grand Jury, does it matter to you in your warning to him of his Fifth Amendment rights in the presence of the Grand Jury, and you are responsible under the law to know that there has been an intelligent waiver of his Fifth Amendment rights, isn't it important to you to know how far he went to school?

THE WITNESS: Not necessarily how far he went to school, his formal education, since I wasn't asking him to read the card. It would be relevant to me if the witness that I brought in, and we regularly bring witnesses in and warn them of their rights, it would certainly be significant to me if by looking at the man,

listening to the man answering the questions, his demeanor, his appearance, and if I didn't think he understood what was happening or if he had a low IQ or didn't understand what was happening, or he looked physically ill, or any slight, the slightest indication that it wasn't voluntary and that he didn't understand what was going on, it certainly would make a difference.

THE COURT: And you just discerned this by looking at him and listening to the way he said yes or no to the [67] questions that you put to him?

THE WITNESS: Just as I can with dozens of witnesses that I put in front of the Grand Jury every day, Your Honor.

THE COURT: Well, that doesn't make it right That's what I am trying to decide here, Mr. Shine, is whether or not as the law requires that the waiver of constitutional rights was an intelligent waiver. The courts have held that there can be no waiver if the defendants do not know their rights and the rule must be to say anything when the record is silent or inconclusive concerning knowledge and basic constitutional protection, especially in criminal cases, should not be suspended by mere inferences from indifferent facts or doubtful presumptions, and what I'm trying to ask you, or what I'm trying to decide for myself is whether or not we brought about a suspension of this man's constitutional rights by inferences that you drew from the way he gave his responses to you to the questions.

THE WITNESS: May I indicate this, Your Honor, by way of example.

I had not too long ago and, in fact, I'm not sure whether it was before or after, a man come into the Grand Jury in a murder case who technically could have been charged with being an accessory after the fact of murder.

I warned him of his rights and when I asked him if he wanted a lawyer he indicated, "Well, I'm not sure [68] whether I should have one or not. What do you think?" at which point I said, "Well, look, if you have any doubt about it, you need a lawyer," and I brought

him up in front of the Chief Judge of this Court and the Chief Judge appointed a lawyer to represent him.

Regularly we have witnesses who are not warned of their rights.

THE COURT: Well, you knew that anything he said was—Number One, you knew that he was a suspect, did you not?

THE WITNESS: Well, it depends on what you mean by suspect. I knew that if the story was believed that he was not chargeable and none of the three men were chargeable. If his story was not believed, then he could be indicted, and in that sense he was a suspect.

I had not in detail questioned him about his story and therefore at that time I didn't know whether he was going to be indicted or not.

THE COURT: And so you didn't tell him then that not only did he have a right not to answer but in addition to that, if he did answer and his answers were incriminatory they could bring about his indictment by the very Grand Jury that you were before and that it could ultimately lead to his prosecution?

THE WITNESS: Did I warn him of whether or not he could be indicted if his story were disbelieved? No, I [69] did not.

THE COURT: All right. Any other questions?

MR. BEIZER: Just one question, Your Honor.

[REDIRECT EXAMINATION OF RICHARD SHINE]

BY MR. BEIZER:

Q Do you remember whether or not you had the jacket in your hand, that is, the DA's jacket, the office file, in your hand when you saw Mr. Washington first in your office when you talked to him briefly there, in other words, whether you had seen Mr. Stuckey's notes or not at that time?

A I'm sure—probably I saw Mr. Stuckey's notes on the day that I issued the subpoena and not on the 5th of February if that was the day that Mr. Washington was in fact there. That's what precipitated me to—I don't know if that's the right word—that is what caused

me to issue the subpoena, and I had the jacket on the day that Mr. Washington was in fact there.

MR. BEIZER: I have no further questions, Your Honor.

THE COURT: All right. Thank you very much, Mr. Shine.

THE WITNESS: May I be excused, Your Honor?

THE COURT: Yes.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

• • • •

[70] THE COURT: I hold that the warning that was given by Mr. Shine to this defendant before the Grand Jury is inadequate, and that as the Supreme Court has said, a heavy burden rests on the Government to demonstrate that a defendant knowingly and intelligently waived his privilege against self-incrimination, and that was in *Miranda* v. *Arizona* where the Supreme Court first said that.

I hold that whatever validity that the PD Form 47 has insofar as used by the Metropolitan Police officers, the use of which I do not question, and the validity of which I do not question because it is being used by a police officer on the street under circumstances as to which he has made an arrest, and the Supreme Court has there directed that the warning at that time be given, but I hold that something more, I respectfully say, is required of the United States Attorney's Office with respect to people that they view as suspects that they bring before the Grand Jury.

Now what is at least required in my judgment, and I do not find it in this case, was the requirement that inquiry be made of the suspect to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitu- [71] tional right and in the event that he does make incriminatory statements, to wit, and more specifically, "that it could result in his

indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prosecution for a criminal offense and whatever you say here could at that time be used against you," and I find on the basis of this record that there is an absence of any evidence which would satisfy me that the United States Attorney's Office has distinguished from a police officer assured that in this case an intelligent and knowing waiver of Fifth Amendment rights was exercised.

Now, there remains still the question of whether or not I should dismiss the indictment. In the absence of knowing what other testimony there was before the Grand Jury, I can't rule on that.

MR. BEIZER: Your Honor, may I continue this then for the Government to present it?

THE COURT: Well, do you have the Grand Jury transcript?

MR. BEIZER: Yes, I have the entire Grand Jury transcript, Your Honor, and I would submit it to you for your consideration.

THE COURT: All right, you submit it in camera and I'll look at it and I'll rule as to whether or not it should be dismissed.

[72] MR. BEIZER: Your Honor, I would just like to make two statements for the record so that I understand the basis for your ruling.

One, I understand that you have now suppressed for use at trial in Government's case in chief of the statements made by Mr. Washington at the Grand Jury.

THE COURT: At the Grand Jury only.

MR. BEIZER: At the Grand Jury only.

THE COURT: Yes.

MR. BEIZER: And the statements to the police are still permissible?

THE COURT: I deny the motion with respect to the statements that he made to the police.

MR. BEIZER: Secondly, for the record, our position is as is stated in our opposition.

THE COURT: Don't reargue the case, Mr. Beizer. I'm not interested in hearing reargument. If you stated your position I'm sure I heard it. Now, if you got the Grand Jury transcript, if you will hand it to Mr. Malley, I'll examine it and I'll determine whether or not there is sufficient evidence presented to the Grand Jury to sustain the indictment independent of this witness' testimony.

MR. CHERRIN: Your Honor, may I have the opportunity to examine that also?

THE COURT: Not on your life, sir.

[73] MR. CHERRIN: Well, I would object to it being read in camera.

THE COURT: Well, you can raise it in the Court of Appeals.

THE DEPUTY MARSHAL: All rise. By order this Honorable Court stands adjourned until 9:45 Monday morning.

(Whereupon at 5:10 o'clock p.m. the proceedings in the above-entitled cause were concluded.)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

Criminal No. 16947-73

UNITED STATES OF AMERICA

vs.

GREGORY V. WASHINGTON

ORDER

This cause came on for hearing before the Court upon defendant's motion to suppress statements made by him to Officer Ralph Snoots of the Metropolitan Police Department, to suppress his testimony given before the Grand Jury on February 5, 1973 and to dismiss the indictment returned against him charging him with the offenses of Grand Larceny and Receiving Stolen Property and upon consideration of the motion, the memoranda and exhibits filed in support thereof and in opposition thereto, and under further consideration of the testimony adduced in open Court and of argument of counsel made in open Court and it appearing to the Court that no reason as a matter of law exists for suppressing the statements made by this defendant to Officer Ralph Snoots of the Metropolitan Police Department; and it further appearing to the Court that the Assistant United States Attorney who conducted the Grand Jury hearing in this case had a special obligation, over and above the mere reading of Police Department Form 57, which was designed to assist police officers pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), to assure that this defendant did not misunderstand the significance of a waiver of his Fifth Amendment right not to incriminate himself before the [2] Grand Jury; and it further appearing to the Court that no counselling respecting surrender of his Fifth Amendment right was provided by the Assistant United States Attorney to this

defendant before entering the Grand Jury room, nor was any other action taken by the Assistant United States Attorney to assure that this defendant, before entering the Grand Jury room, understood and appreciated in the light of his background and educational qualifications the potential impact involved in a waiver of Fifth Amendment rights; and it further appearing to the Court that no evidence has been presented to this Court by the United States to demonstrate that this defendant, after having been subpoenaed to testify before the Grand Jury on February 5, 1973, knowingly and intelligently waived his privilege against self-incrimination; and it further appearing to the Court after an *in camera* reading of the entire testimony heard by the Grand Jury in this cause that, in the absence of this defendant's testimony before the Grand Jury, no competent evidence exists upon which the Grand Jury could rely in properly returning the instant indictment against this defendant, it is by the Court this 5th day of July, 1973,

ORDERED that defendant's motion to suppress statements made by him to Officer Ralph Snoots of the Metropolitan Police Department be and the same hereby is denied; and it is

FURTHER ORDERED that this defendant's motion to suppress the testimony given by him before the Grand Jury on February 5, 1973 be and the same hereby is granted, and that said testimony be and the same hereby is suppressed; and it is

FURTHER ORDERED that the indictment returned in this cause be and the same hereby is dismissed; and it is

[3] FURTHER ORDERED that the Clerk of this Court shall be and he hereby is directed to retain the Grand Jury testimony of this case on file *in camera* for purposes of appeal.

/s/ Joseph M Hannon
Judge

SUPREME COURT OF THE UNITED STATES

No. 74-1106

UNITED STATES, PETITIONER

v.

GREGORY V. WASHINGTON

ORDER ALLOWING CERTIORARI, Filed June 1, 1976

The petition herein for a writ of certiorari to the District of Columbia Court of Appeals is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 216024 281

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-1106

UNITED STATES OF AMERICA,
Petitioner,

v.

GREGORY V. WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to
The District of Columbia Court of Appeals

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In light of the fact that this Court has already granted a writ of certiorari in *United States v. Mandujano*, 496 F.2d 1050 (Sup. Ct. No. 74-754, writ of certiorari granted March 24, 1975), the respondent herein does not oppose the government's petition for a writ of certiorari in this case. In *Mandujano*, the government has asked this Court to rule that no witness before a grand jury, even a potential defendant who is in

fact the target of the grand jury's inquiry, is entitled to be advised prior to testifying of his Fifth Amendment privilege against self-incrimination. As the government's petition in *Mandujano* sets forth the facts, however, that case does not squarely present the broad question the government seeks to have this Court answer. The instant case does. Unlike Mandujano, the respondent here was the target of the grand jury before which he testified; Mandujano, according to the government's petition, was a witness before a grand jury investigating other suspects. Unlike Mandujano, the respondent here was indicted for the substantive offense about which he testified; Mandujano was indicted for perjury because he lied to the grand jury.[1] Since this Court is being asked to make a broad ruling cutting across distinct fact situations, respondent submits that the Court should have before it a case, such as the instant one, which presents the issue raised by the government in its purest form.[2]

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[1] Mandujano was also indicted for an attempt to sell heroin. After the district court suppressed Mandujano's grand jury testimony, the government proceeded to trial on the heroin charge without the use of that testimony. Mandujano was convicted and his conviction was affirmed by the Court of Appeals, 499 F.2d 370 (C.A. 5, 1974), a separate decision from that to be reviewed in No. 74-754. Mandujano's petition for a writ of certiorari to review that decision (Sup. Ct. No. 74-5441) was denied on January 13, 1975.

[2] On or before May 21, 1975, respondent will file a cross-petition for a writ of certiorari to review another part of the decision of the Court of Appeals in this case. See note 5, *infra*.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether a person subpoenaed to testify before the grand jury who is in fact the target of the grand jury inquiry is entitled to be advised of his Fifth Amendment privilege against self-incrimination, including the warning that he is the target of the grand jury and might be indicted.

COUNTERSTATEMENT OF THE CASE

Respondent's van, occupied at the time by two of respondent's friends, was seized and impounded by the police after they discovered a stolen motorcycle in its rear compartment. As the petition correctly points out, respondent's initial efforts to recover his van were unsuccessful because the police officer connected with the investigation did not believe respondent's explanation for the presence of the motorcycle and refused to release the van. Respondent next sought the release of his van from Assistant United States Attorney Stuckey, then assigned to the grand jury section of the United States Attorney's Office. As the petition states accurately, Stuckey too did not believe respondent's explanation. Because he doubted the truthfulness of respondent's story, Stuckey subpoenaed respondent to appear before the grand jury (Tr. 42).[3] At this point, however, the petition passes over certain critical facts of record.

In giving the subpoena to respondent, prosecutor Stuckey did not tell respondent that the grand jury was focusing on *him*, much less that he might be indicted as a result

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[3] "Tr." refers to the one-volume transcript of the suppression hearing held on June 29, 1973.

of his own testimony. Stuckey did not even tell respondent that he might be wise to consult an attorney. Instead, Stuckey told respondent only that he was needed by the grand jury "as a witness" (Tr. 38).

Respondent appeared before the grand jury pursuant to the subpoena. Assistant United States Attorney Shine was in charge of the grand jury that day. Shine had read the notes of Stuckey's interview with respondent and shared Stuckey's doubts as to the veracity of respondent's story. He determined to put respondent before the grand jury to let that body pass on the credibility of respondent's story, realizing the likelihood that respondent would be indicted (Tr. 56).

Respondent was brought into the grand jury room and the oath was administered; then, for the first time, in front of the assembled grand jurors, Shine advised respondent of his right to remain silent and his right to an attorney. These were the only warnings given to respondent at any time prior to his grand jury testimony. Significantly, the warnings were given without any indication to respondent as to why he might choose to remain silent or to request an attorney: he was never advised, at any time, that *he* was a potential defendant who could and probably would be indicted, by that grand jury, solely on the basis of his own testimony. From all that appears in the record, respondent testified on the obviously mistaken assumption that he was a witness in a case involving two other persons.

Respondent was indicted for grand larceny and receiving stolen property; the sole basis for the indictment was his testimony before the grand jury.

After a hearing on respondent's motions to suppress and to dismiss the indictment, the Honorable Joseph M.

Hannon, presiding in the Superior Court for the District of Columbia, found as a fact that at the time he appeared before the grand jury, respondent was the target of the grand jury whom the prosecutor had reason to think would be indicted. The trial court held that respondent did not voluntarily, knowingly and intelligently waive his Fifth Amendment privilege, in part because he was forced to assert the privilege or waive it in front of the grand jury itself and in part because the warnings did not inform him that he was a potential defendant who was likely to be indicted by that very grand jury. Accordingly, the trial court suppressed respondent's grand jury testimony. After reviewing the entire grand jury transcript, the trial court also found as a fact that the indictment against respondent was based *solely* on respondent's illegally obtained grand jury testimony. Finding no other evidence to support the indictment, the trial court granted the motion to dismiss.[4]

The United States appealed. A panel of the District of Columbia Court of Appeals, in an opinion written by Judge Nebeker, affirmed the trial court's suppression of respondent's grand jury testimony, holding that respondent had not voluntarily, knowingly and intelligently waived his Fifth Amendment privilege because he was not told, and presumably did not know. that he was the target of the

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[4] The trial court's written opinion and order dismissing the indictment, dated July 5, 1973, is not appended to the government's petition. It is attached as an appendix to respondent's cross-petition. See note 5, *infra*.

grand jury's inquiry and because the setting inside the grand jury room was not conducive to a truly voluntary waiver.[5]

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[5] A majority of the panel, with Judge Kern vigorously dissenting, reversed the trial court's dismissal of the indictment, holding that *any* facially valid indictment is enough to call for a trial of the charge on the merits. On December 20, 1974, respondent filed a Petition For Rehearing *En Banc* with respect to that part of the decision by the majority of the panel which reversed the trial court's dismissal of respondent's indictment. On February 20, 1975, the District of Columbia Court of Appeals denied respondent's Petition For Rehearing *En Banc*, with three judges, not including Judge Kern, voting to grant the Petition.

Respondent intends to file a cross-petition for a writ of certiorari to review that part of the court's decision which reversed the trial court's dismissal of respondent's indictment. Respondent recognizes, as did the dissenting judge below, that under prior decisions of this Court, indictments based in part on incompetent evidence or evidence obtained illegally outside the grand jury are nevertheless valid. Respondent agrees with the dissenting judge, however, that indictments based *solely* on evidence extracted by the grand jury *itself* in violation of the defendant's Fifth Amendment rights cannot be sustained. Respondent's petition is presently due to be filed in this Court on May 21, 1975, time for filing having been tolled by the filing of the Petition For Rehearing *En Banc*. *Department of Banking v. Pink*, 377 U.S. 264, 266 (1942).

ARGUMENT

From the foregoing statement of the case, it should be clear that this case is not *Mandujano*. In *Mandujano*, the government has asked this Court to decide the important question of whether a grand jury target witness is entitled to be advised of his rights in a case in which, according to the government's own characterization of the facts, the witness was not even the target of the grand jury, and in which the witness was not indicted for the substantive offense about which he testified, but was indicted for perjury because he lied to the grand jury.[6] If it is true, as the government asserts in its petition in *Mandujano*, that at the time of Mandujano's grand jury testimony, the government had no interest in Mandujano himself and was interested only in others about whom Mandujano was thought to have information,[7] then perhaps he was more like an ordinary grand jury witness and, as such, was entitled to no special warnings of his rights. Even if Mandujano was entitled to certain warnings which he did not receive, he was clearly warned about perjury, and the government may be correct when it contends that he had no license to lie to the grand jury and then have his testimony suppressed in a resulting prosecution for perjury. Whatever the answers to these questions may be, however, they do not control Mr. Washington's case.

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[6] See note 1, *supra*.

[7] The government goes so far as to speculate that if Mandujano had cooperated and given truthful testimony, he would not have been indicted for the substantive drug offense and, of course, could not have been indicted for perjury either. Petition in *Mandujano* at 17, note 9.

Gregory Washington was, by any definition and in the truest sense of the term, a "putative defendant." A police officer and two prosecutors had discredited his story about the motorcycle found in his van, and he was subpoenaed to the grand jury for the *sole* purpose of obtaining an indictment against him if the grand jury also did not believe his testimony. Apparently the grand jury did not believe Mr. Washington's testimony, and he was indicted. He was indicted not for perjury, but for the substantive crime about which he testified. Moreover, he was indicted solely on his own testimony; if he had not testified he could not have been indicted.

This case, then, presents in pure form the question which the government seeks to have this Court decide in *Mandujano*. Respondent respectfully submits that this Court should have before it a case in which the witness was in fact the target of the grand jury if it intends to rule broadly, as the government has requested, on the rights of target witnesses or "putative defendants."

CONCLUSION

For the foregoing reasons, respondent does not oppose the government's petition for a writ of certiorari.

Respectfully submitted,

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601 Indiana Avenue, N.W.
Washington, D.C. 20004
Counsel for Respondent

May, 1975.

No. 74-1106

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

GREGORY V. WASHINGTON

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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RICHARD L. THORNBURGH,
Assistant Attorney General,

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 328 A.2d 98. The oral opinion (Pet. App. C) and the order (A. 70-71) of the superior court are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on November 6, 1974. On January 28, 1975, the Chief Justice extended the time within

which to file a petition for a writ of certiorari to and including March 6, 1975. The petition was filed on March 5, 1975, and was granted on June 1, 1976 (A. 72). The jurisdiction of this Court rests on 28 U.S.C. [redacted] 1257(3).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compulsory self-incrimination requires the government to give warnings to grand jury witnesses who, by virtue of incriminating evidence already in the government's possession, are "potential defendants."

2. Whether the Self-Incrimination Clause or the Due Process Clause of the Fifth Amendment requires that grand jury witnesses who are "potential defendants" be given "target" warnings.

3. Whether, if any warnings are required, they must be given out of the presence of the grand jury.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. On the night of December 3, 1972, an officer of the Washington, D.C., police department stopped a van after observing it make a U-turn (A. 38). The officer then spotted a motorcycle in the back of the van that was listed as having been recently stolen

(*ibid.*). The two persons in the van, Samuel Zimmerman and Ruben Woodard, were thereupon arrested and the van was impounded. Zimmerman said that he thought that the motorcycle belonged to the owner of the van (A. 38-39).

The police determined that respondent owned the van and notified him that it was in the possession of the police department (A. 26, 39). At that point the police believed it possible that the van had been stolen from respondent by criminals involved in the motorcycle theft (A. 26). One or two days after the arrest of Zimmerman and Woodard, however, respondent went to the police department to recover the van and told the police officer on duty that he would not press charges against them because they were friends of his and had had his permission to use the van (A. 27-29). He explained the presence of the motorcycle by relating that he had been driving the van earlier in the evening and had offered assistance to a person whose motorcycle had broken down, that the van itself had broken down shortly after loading the motorcycle into it, and that he had thereupon left the owner of the motorcycle with the van, apparently to summon his friends to fix the van (A. 28-31). The officer to whom respondent related this story said that he did not believe respondent and told him that "I wouldn't go to court and testify to that fact because you're liable to be in trouble if you did" (A. 36). The officer did not release the van.

Respondent then went to the United States Attorney's office where he met with Assistant United States Attorney Richard Stuckey in an effort to arrange for release of the van. Stuckey similarly doubted respondent's story, but he released the van nonetheless, since respondent apparently needed it and the government had no evidentiary use for it (A. 44-45). Stuckey did, however, give respondent a subpoena to appear before the grand jury, knowing from past experience that friends of suspected criminals are often reluctant to testify about the suspects before the grand jury, and fearing that respondent would have no incentive to cooperate with further investigatory efforts once the van was released to him (A. 45-48). Stuckey also thought that respondent might not return voluntarily if respondent's story regarding the motorcycle were false (A. 48).

On February 5, 1973, respondent appeared before the grand jury. The government attorney in charge, Assistant United States Attorney Richard Shine, had not determined whether to seek an indictment against respondent. Rather, he was not sure himself what respondent's testimony would be, or whether it would be believable, and accordingly he decided simply to present "the whole matter to the Grand Jury so they could decide whether to ignore all three men or indict the two men who were arrested in possession of the truck or indict Mr. Washington by himself or do what they chose on whatever they decided to believe having heard the testimony of Mr. Washington" (A. 57, 58). Believing that there was a possibility that respondent would be indicted, however, Shine gave respondent the following warnings prior to asking him any question about the crime (A. 3-4):

> Q. Before I ask you any questions I have to tell you what your rights are. I'd like you to listen carefully and I'm going to ask you some questions about your rights afterwards.
>
> You are not under arrest. You're just here by way of subpoena.
>
> Before I, or anybody else in the Grand Jury, ask you any questions you must understand what your rights are.
>
> You have a right to remain silent. You are not required to say anything to us in this Grand Jury at any time or to answer any questions.
>
> Anything you say can be used against you in Court.
>
> You have the right to talk to a lawyer for advice before we question you and have him outside the Grand Jury during any questioning.
>
> If you cannot afford a lawyer and want one a lawyer will be provided for you.
>
> If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time.
>
> You also have the right to stop answering at any time until you talk to a lawyer.
>
> Now, do you understand those rights, sir?
>
> A. Yes, I do.
>
> Q. And do you want to answer questions of the Grand Jury in reference to a stolen motorcycle that was found in your truck?
>
> A. Yes, sir.

Q. And do you want a lawyer here or outside the Grand Jury room while you answer those questions?

A. No, I don't think so.

Respondent was then shown a standard form containing *Miranda* warnings and an agreement to waive the Fifth Amendment privilege. He signed the form (A. 52) and was thereupon questioned about his knowledge of the motorcycle theft.[1] His testimony (much like his story earlier told to the policeman and the Assistant United States Attorney, but with some elaboration), was that he had offered aid to an individual (theretofore unknown to him) whose motorcycle had broken down; that his van had broken down shortly after the motorcycle was loaded onto it; that respondent went to a nearby gasoline station and telephoned Zimmerman and Woodard to come fix the van, leaving the motorcycle and its owner with the van; that he waited at the station for approximately two hours in vain for his friends; that when he then returned to where he had left the van it was gone; that he did not notify the police because he assumed that his friends had arrived, fixed the van, and driven it away; and that the motorcycle owner was never seen or heard from again (A. 4-20).

The grand jury indicted respondent, Zimmerman, and Woodard for grand larceny (22 D.C. Code 2201) and receiving stolen property (22 D.C. Code 2205).

[1] The form was the same one used by the Metropolitan Police Department prior to custodial questioning (A. 51, 64).

2. Respondent moved to quash the indictment on the ground that it was based on grand jury testimony obtained in violation of his privilege against self-incrimination. After a suppression hearing, the Superior Court for the District of Columbia held that the warnings given respondent did not adequately safeguard his Fifth Amendment rights (Pet. App. 19a) in that, because respondent was a suspect when he appeared before the grand jury, an inquiry should have been made "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege and whether he fully understands the consequences of what might result in the event that he does waive his constitutional right and in the event that he does make incriminatory statements * * *" (Pet. App. 20a). The court also ruled that respondent should have been warned that his testimony could result in his indictment by the grand jury before which he was testifying, that thereafter he could be required to stand trial in a criminal court on prosecution for a criminal offense, and that statements made before the grand jury could be used against him at such trial (*ibid.*). The court accordingly suppressed respondent's grand jury testimony and dismissed the indictment against him.

The District of Columbia Court of Appeals affirmed the suppression order,[2] ruling that the warnings

[2] The court of appeals reversed the trial court's dismissal of the indictment (Pet. App. 4a-13a). Respondent's cross petition seeking review of that ruling was denied on June 1, 1976 (No. 74-6579).

given to respondent were deficient for the principal reason that the prosecutor had not advised respondent that he was a "potential defendant" and for the additional reason that the prosecutor had "wait[ed] until after administering the oath in the cloister of the grand jury before undertaking to furnish what advice was given" (Pet. App. 3a).

SUMMARY OF ARGUMENT

This case raises questions similar to those presented in *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976. In *Mandujano* the Court decided that the Fifth Amendment does not require that grand jury witnesses who are "putative" or "potential" defendants must be warned of their rights as a prerequisite to the use of their allegedly false grand jury testimony in a subsequent prosecution for perjury. Now the Court must decide whether the rule is different when, as here, the government seeks to use the witness's grand jury testimony in a prosecution for a crime other than perjury. We submit that the result should be the same.

In finding the warnings administered to respondent deficient, the court of appeals below has in effect ruled that "potential defendants" are constitutionally entitled both to full *Miranda* warnings (which respondent got) and to be explicitly advised of their "potential defendant" status (which respondent was not). It also held that the Constitution requires that these warnings be given out of the presence of the

grand jury. Thus, this decision goes significantly farther than that of the court of appeals in *Mandujano*, which held only that *Miranda* warnings are required.

For much the same reasons as we urged in *Mandujano*, we think that the Constitution requires no warnings whatever, least of all full *Miranda* warnings or "potential defendant" warnings. Even if we are wrong, and some warnings are held to be necessary, we submit that there is no basis for concluding that the Constitution requires them to be given out of the grand jury's presence.

1. Neither the interrogation of persons suspected of crime nor the use in evidence of incriminating admissions by a defendant is prohibited by the Fifth Amendment privilege against compelled self-incrimination. Moreover, the requirement of *Miranda* that interrogation be preceded by a full advice of rights is not itself an ingredient of the constitutional privilege but a prophylactic measure designed to neutralize the inherently coercive atmosphere perceived by the *Miranda* majority to pervade the process of incommunicado custodial police interrogation. *Michigan* v. *Tucker*, 417 U.S. 433, 444. The fatal flaw in the court of appeals' application of a warnings requirement to "putative defendants" called before a grand jury lies in the court's failure to consider the terms of the constitutional provision itself, particularly the requirement that there be compulsion of testimony in order to bring the privilege into play.

The salient features of incommunicado police interrogation, outlined at considerable length in the *Miranda* opinion, are markedly different in their potential for overbearing the will of the individual from the characteristics of grand jury questioning. *United States* v. *Mandujano*, *supra* (plurality op. 14-15). The latter takes place before at least 16 private citizens and the proceedings are often recorded, as they were here. The opportunities for use of physical force, threats, or trickery to overcome a witness's determination not to testify are thus virtually nonexistent. Accordingly, it has long been recognized by this Court that a grand jury witness must claim the privilege "or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U.S. 424, 427. The continuing validity of that proposition was reaffirmed last Term in *Garner* v. *United States*, No. 74-100, decided March 23, 1976 (slip op. 6-7).

In short, to extend the concepts underlying a warnings requirement in the context of in-custody interrogation to questioning before a grand jury would be "an extravagant expansion never remotely contemplated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court" (*Mandujano*, *supra*, plurality op. 15).

Moreover, if grand jury questioning is to be equated with incommunicado police interrogation as inherently coercive, it is difficult to see why it is more coercive of "potential defendants" than of other wit-

nesses. Indeed, the "potential" or "putative" defendant concept is of no use in making the critical constitutional inquiry into compulsion. The tests for identifying "potential defendants" focus on the prosecutor's subjective intentions and/or the objective state of the government's evidence against the witness, whereas the presence or absence of impermissible compulsion turns upon the state of mind of the individual, upon the question whether, in the circumstances, it is likely that his will was overborne. A warnings requirement based on the Fifth Amendment privilege would accordingly rest upon the self-contradictory thesis that grand jury questioning is constitutionally coercive of some witnesses, who can be identified and distinguished from all others only on the basis of factors having nothing to do with coercion.

In sum, warnings regarding the privilege against compulsory self-incrimination are not required to precede any governmental questioning of an individual simply because the government may be on notice that the questions it plans to ask are likely, if answered, to result in incriminating evidence. Rather, the critical inquiry under the Self-Incrimination Clause is whether there has been "genuine compulsion of testimony" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 440); and whether a person has been compelled within the meaning of the Fifth Amendment, or whether certain situations may be said to be inherently coercive, has nothing to do with the strength or content of the government's suspicions at the time of the question-

ing. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976 (slip op. 6).

2. If the Self-Incrimination Clause does not require warnings regarding the privilege, then it follows that it does not require "potential defendant" or "target" warnings either, since a grand jury witness is not more coerced by the government's failure to advise him of his "putative defendant" status than by the failure to advise him of his privilege against compulsory self-incrimination. Even if, on the other hand, some form of advice regarding the privilege is required, a "target" warning is still unnecessary, for grand jury questioning can surely be no *more* coercive than in-custody police interrogation, where such additional warning is not required.

Nor does the Due Process Clause require "potential defendant" warnings. Such a warning can ordinarily be of utility to a grand jury witness only insofar as it may encourage him either to lie or to decline to answer. The former consequence would enjoy no protection in our system; the latter is fully protected by the Fifth Amendment's testimonial privilege. Thus, the Due Process Clause supplies no independent basis for requiring "target" warnings.

In any event, there is nothing fundamentally unfair in the failure to administer such warnings to grand jury witnesses such as respondent, and accordingly, there is no basis for holding them to be required by due process considerations. Those witnesses who actually are "potential defendants" are likely to know better than anyone else whether they committed

the crime under investigation, and it is not offensive to any reasonable concept of fairness for the government to question such witnesses without first reminding them that the grand jury may call them to task for such lawbreaking as they may have engaged in.

The facts of this case are illustrative. Respondent by his own volunteered statements to the authorities had demonstrated himself to be peculiarly knowledgeable about the circumstances surrounding a crime that he knew was under investigation. He also knew that his innocent explanation of his involvement had been disbelieved by the police officer to whom he first related it. Neither the government attorney who served him with the grand jury subpoena nor the one who questioned him before the grand jury had determined to seek an indictment against him prior to his testimony. In these circumstances the government's conduct in failing to tell respondent that he was a "potential defendant" can hardly be said to have been unfair at all, let alone to have violated "fundamental fairness" or to be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246).

In addition to lacking the requisite constitutional predicate, adoption of special rules for "potential defendants" that may tend to inhibit their cooperation with the grand jury is not good policy. It is common to call as grand jury witnesses individuals who are known or suspected to be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in

the case of most such witnesses, for a variety of reasons, that there is no fixed intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses.

The fact that the narrow self-interest of such witnesses might on occasion counsel a refusal to testify is no reason for society to adopt rules likely to discourage their cooperation with the grand jury's inquiry, so long as that cooperation is voluntary and has not been induced by force, threats, or trickery.

3. Finally, even if the Constitution does require some sort of warnings, neither the record below nor common sense supports the court's ruling that it also forbids their administration in the presence of the grand jury. Although the court of appeals articulated no reasons for its holding in this regard, it apparently was based on the notion that warnings so administered are ineffective, either because of the presence of the grand jury itself or the imminency of questioning. But no evidence in this case indicates that the timing of the warnings given respondent made them ineffective, or that, as a general matter, warnings given in the presence of the grand jury are ineffectual *per se*. Indeed, the reverse would seem equally if not more plausible: warnings given in front of the grand jury immediately before questioning are likely to be *most* effective, since that is the time nearest when the witness will have to decide whether to answer questions or invoke his privilege,

and the presence of the grand jurors might assure accurate warnings and lend special credence to the prosecutor's words.

In any event, the record below will not support the conclusion that the deliberative atmosphere of the grand jury room is any less conducive to rational decisionmaking by the witness than the courthouse hallway or the prosecutor's office, and accordingly the imposition of a constitutional requirement that such warnings as are necessary must be given out of the grand jury's presence was unwarranted.

ARGUMENT

I. Introduction

This case, like *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976, raises questions concerning the extent to which, if at all, the government is constitutionally required to give warnings to grand jury witnesses called to testify about criminal activities as to which the government possesses evidence suggesting that they may have been personally involved. In *Mandujano* the court of appeals had relied on both the Due Process and Self-Incrimination Clauses of the Fifth Amendment in affirming the suppression of the defendant's allegedly perjurious testimony on the ground that, although he had been a "putative defendant" at the time of his testimony, the government had neglected to give him full *Miranda* warnings. We urged reversal for the reasons that (1) no warnings, least of all *Miranda* warnings, are constitutionally required to be given to grand jury witnesses, whether or not "putative

defendants"; (2) Mandujano was not in fact a "putative defendant" at the time of his testimony; (3) witnesses may not avoid improper testimonial compulsion by false swearing; and (4) suppression was an inappropriate remedy even assuming a constitutional violation.

In voting to reverse, all eight Justices participating in *Mandujano* agreed that the government's conduct had not denied the defendant due process of law and that the privilege against self-incrimination could not be invoked to suppress perjurious testimony. There was accordingly no decision whether warnings of any sort are constitutionally required to be given to "putative defendants" in general, or what remedy is appropriate for a failure by the government to give any warnings that may be held to be required.

This case presents those issues squarely. The government sought to use respondent's grand jury testimony in prosecuting him for the theft that was the subject of the grand jury investigation.[3] The superior court suppressed that testimony on the ground that, even though the respondent had received full *Miranda* warnings before testifying, the government had not shown that he had "knowingly and intelligently waived" his privilege against self-incrimination (Pet. App. 19a), since it had neither inquired into respond-

[3] *United States* v. *Wong*, No. 74-635, certiorari granted, June 1, 1976, also raises the question whether warnings are necessary in the grand jury context, but that case involves a prosecution for allegedly perjurious grand jury testimony, and for that reason it is governed, in our view, by this Court's decision in *Mandujano*.

ent's educational background nor given him the added warning that his testimony " 'could result in [your] indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prosecution for a criminal offense and whatever you say here could at that time be used against you' " (Pet. App. 20a). In affirming, the court of appeals ruled that the *Miranda* warnings given by the prosecutor were inadequate in view of his "failure to maintain a scrupulous concern that waiver must be knowingly and intelligently made," and that "the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" (Pet. App. 3a). The court also ruled that respondent had not been adequately advised of his rights for the additional reason that the prosecutor had given the *Miranda* warnings "in the cloister of the grand jury" (*ibid.*).

Thus, this case is like *Mandujano* insofar as the court below ruled (albeit implicitly) that grand jury witnesses against whom the government has some (unspecified) quantum of evidence of involvement in the crime or crimes under investigation are entitled by the Fifth Amendment's Self-Incrimination Clause to be given full *Miranda* warnings before testifying.[4]

[4] Unlike the lower court in *Mandujano*, the court of appeals in the present case did not mention the Due Process Clause and appears to have rested its holding on the Self-Incrimination Clause alone. We nonetheless address the due process issue (Part III, *infra*), viewing it as a potential alternative ground for the result reached by the court of appeals.

This case goes considerably beyond the court of appeals' ruling in *Mandujano*, however, in holding that such witnesses are, in addition, constitutionally entitled both to a "potential defendant" warning and to the receipt of all warnings out of the presence of the grand jury.

For much the same reasons as we urged in *Mandujano*, we believe that grand jury witnesses, even those who are "potential defendants," are not entitled by the Fifth Amendment privilege against compulsory self-incrimination to any warnings whatever (Part II, *infra*). We also argue that, whether or not some advice of the privilege against self-incrimination is held to be necessary, a "putative" or "potential" defendant warning is not constitutionally mandated and would be unsound as a matter of policy as well (Part III, *infra*). Finally, we submit that, even if the Constitution does require that warnings be given, it does not forbid their administration in the presence of the grand jury (Part IV, *infra*).

II. The Failure Expressly To Advise A "Potential Defendant" Of His Self-Incrimination Privilege Does Not Impermissibly Compel His Testimony In Violation Of The Fifth Amendment

The fruitfulness of a grand jury's inquiry will often depend on its ability to secure information from persons having knowledge of the type of criminal activity under investigation. Of necessity, such knowledge is most often possessed by those who themselves are involved in or at the fringes of such activities, and who thereafter are most likely to fall within the "potential defendant" category.[5] Accordingly, so long as it is not the product of improper compulsion or trickery, truthful testimony by "potential defendants" should be assiduously encouraged.

Although in this case the government attorney managing the grand jury gave respondent full *Miranda* warnings, and although it is common practice for government attorneys to advise grand jury witnesses who are suspected of involvement in the criminal activity under investigation of their privilege against self-incrimination, we submit that the

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[5] The court of appeals did not explain precisely what it meant by the expression "potential defendant," nor by what standards witnesses who are "potential defendants" are to be distinguished from other grand jury witnesses. Although "potential defendants," "putative defendants," and "targets" might well represent different categories of grand jury witnesses, depending on what standards are settled upon for identifying those witnesses who may be entitled to receive such warnings as might be held to be necessary, for the sake of convenience we use these expressions interchangeably. The problems in identifying such witnesses are discussed in Part III, *infra*.

Fifth Amendment does not require the routine administration of any warnings whatever. While the privilege against compulsory self-incrimination applies to proceedings before a grand jury (*Counselman* v. *Hitchcock*, 142 U.S. 547), there is no basis in the logic or history of the Fifth Amendment for requiring the "practical reinforcement" of the privilege (*Michigan* v. *Tucker*, 417 U.S. 433, 444) through the procedural safeguard of explicit warnings (*Miranda* v. *Arizona*, 384 U.S. 436). Put differently, the questioning of a witness before the grand jury—even a witness who is a potential defendant—is not so inherently coercive that any answers given by the witness must be presumed, absent warnings, to have been unconstitutionally compelled.

We begin our analysis with the general rule, long and firmly established in Fifth Amendment jurisprudence, that when an individual who is called (*e.g.*, by subpoena) to testify makes disclosures instead of claiming the privilege, the government has not compelled him to incriminate himself. *Garner* v. *United States*, No. 74-100, decided March 23, 1976 (slip op. 6); *United States* v. *Kordel*, 397 U.S. 1, 7-10; *Maness* v. *Meyers*, 419 U.S. 449, 466; *Smith* v. *United States*, 337 U.S. 137, 150; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 112-113; *United States* v. *Heike*, 175 Fed. 852, 858 (C.C. S.D.N.Y.); *United States* v. *Kimball*, 117 Fed. 156, 163, 165 (C.C. S.D.N.Y.). The rationale behind this rule can be traced directly to the language by which the privilege is expressed. The Fifth Amendment speaks of compulsion. "It does not preclude a witness

from testifying voluntarily in matters which may incriminate him" (*United States* v. *Monia*, 317 U.S. 424, 427). And this Court has recognized that the rule applies to grand jury witnesses as to any other. If a grand jury witness "desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment" (*ibid*).

"[T]he general rule that the privilege must be claimed" is subject to generic exception only in those "narrowly defined situations" characterized by some constant factor that has been "held to deny the individual a 'free choice to admit, to deny, or to refuse to answer' " (*Garner*, *supra*, at 9 (quoting from *Lisenba* v. *California*, 314 U.S. 219, 241)). In *Miranda* v. *Arizona*, this Court held that custodial interrogation was one such situation. It rested its ruling upon the conclusion that the particular nature and setting of incommunicado police interrogation is so inherently coercive that any statements made in response to such questioning should be presumed to have been compelled within the meaning of the Fifth Amendment unless the government could show that the interrogatee had knowingly and intelligently waived his privilege (384 U.S. at 467). This burden, the Court held, could ordinarily be discharged by proof that the police had given the interrogatee full warnings of his Fifth Amendment rights as a counter to the intimidating atmosphere of custodial interrogation (*id.* at 468-469).[6]

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[6] In addition to prescribing specific warnings of the kind that have come to be used generally by police across the Na-

Although the court of appeals in the present case did not articulate the rationale behind its holding, its implicit assumption that the Fifth Amendment requires that "potential defendants" appearing as witnesses before the grand jury be given *Miranda* warnings would appear to be predicated upon an analogy between the status of such witnesses and the situation of an arrested suspect during incommunicado police interrogation. The analogy fails, however, for two reasons: (1) the presumption adopted by this Court as the basis for its ruling in *Miranda* —that incommunicado custodial police interrogation is inherently coercive (see *Kirby* v. *Illinois*, 406 U.S. 682, 688)—is simply inapplicable to the grand jury setting; and (2) a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not.

A. *The Grand Jury Setting Is Not Inherently Coercive*

The police interrogation environment that formed the basis for the presumption of coercion in *Miranda* contrasts sharply with the nature of the grand jury and the setting in which grand jury questioning occurs. "*Miranda* addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards" (*United States* v. *Mandujano*, *supra*, plurality op.

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tion, the Court suggested it would also find satisfactory other prophylactic procedures "which are at least as effective" (384 U.S. at 467) in apprising the interrogatee of his rights.

14). In a grand jury investigation, however, to an even greater degree than in a normal consent search, "there is no evidence of any inherently coercive tactics —either from the nature of the * * * questioning or the environment in which it [takes] place. Indeed, * * * the specter of incommunicado police interrogation in some remote station house is simply inapposite" (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247). See *United States* v. *Cleary*, 265 F.2d 459, 462 (C.A. 2) ("Appearing before a grand jury is not in itself an unduly coercive situation.").[7]

As the Court noted in *Miranda*, the danger of compulsion during police interrogation arises principally from the fact that the interrogation occurs in private. "The officers are told by the manuals that the 'principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation' " (384 U.S. at 449; emphasis in original). Privacy is "essential to prevent distrac-

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[7] Most courts that have considered the issue have concluded that no grand jury witness, including a "potential" or "putative" defendant, is entitled to express Fifth Amendment warnings prior to testifying. See, *e.g.*, *United States* v. *Scully*, 225 F.2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo*, 413 F.2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *DiMichele*, 375 F.2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; *Commonwealth of Pennsylvania* v. *Columbia Investment Corp.*, 457 Pa. 353, 325 A.2d 289; *State ex rel. Lowe* v. *Nelson*, 202 So.2d 232 (Fla. D.C. App.). But see, in addition to the court of appeals' decision in *Mandujano* (496 F.2d 1050), *United States* v. *Luxenberg*, 374 F.2d 241, 246 (C.A. 6); *United States* v. *Wong*, *supra*; *State* v. *Iverson*, 187 N.W.2d 1, 16 (N.D. Sup. Ct.).

tion and to deprive [a suspect] of any outside support" (*id.* at 455). The police may then "persuade, trick, or cajole [the suspect] out of exercising his constitutional rights" (*ibid.*). Privacy also permits the police to resort to "third degree" tactics, subjecting the suspect to mental or physical exhaustion over long periods of time (*ibid.*).

By contrast to the incommunicado setting in which police interrogation occurs, grand jury questioning takes place in the presence of no fewer than 16 private citizens (Rule 6(a), Fed. R. Crim. P.) who

> bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. *It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.* [*In re Groban*, 352 U.S. 330, 347 (Black, J., dissenting; emphasis supplied).]

Moreover, grand jury questioning is at all times under the supervision of a presiding judge, and a transcript is often made of the proceedings (as was done in the instant case). Accordingly, there is little if any likelihood that a government attorney who questions a witness on behalf of the grand jury could resort to any of the coercive tactics potentially employable by police officers during incommunicado police interrogation. Nor, unlike police interrogation,

where "[p]rivacy results * * * in a gap in [judicial] knowledge as to what in fact goes on in the interrogation rooms" (*Miranda, supra*, 384 U.S. at 448), is there the possibility that—should coercive tactics be employed during grand jury questioning—they may go undetected and be unreviewable on a subsequent claim that the privilege was violated.

Nor does compliance with a subpoena to testify before the grand jury deprive a person of "his freedom of action in any significant way"—a deprivation that the Court in *Miranda* considered the equivalent of "custody" for purposes of defining the point at which "our adversary system of criminal proceedings commences" (384 U.S. at 477; but cf. *Kirby* v. *Illinois, supra*). To the contrary, as this Court noted in *United States* v. *Dionisio*, 410 U.S. 1, 10 (citation omitted):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" * * *. * * *
>
> > "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court."

Moreover, the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and

decide to what extent (if at all) he will respond to questioning. In addition, he can refuse compliance and subsequently contest the legality of a subpoena in a show cause hearing. *United States* v. *Ryan*, 402 U.S. 530, 533; *Cobbledick* v. *United States*, 309 U.S. 323. And, after he has appeared, he is free to resume his daily activities. See *United States* v. *Calandra*, 414 U.S. 338, 343.[8]

Finally, the court of appeals' implicit equation of grand jury investigations to custodial police interrogations utterly fails to recognize the vast difference in history and function of the two processes. The institution of the grand jury—unlike custodial police interrogation—is deeply rooted in Anglo-American history, serving for centuries "both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra*, 414 U.S. 338, 343. The founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "presentments or indictments of grand juries." Cf. *Costello* v. *United States*, 350 U.S. 359, 361-362.

[8] It has generally been recognized heretofore that in responding to a grand jury subpoena a witness is not placed in "custody." See, *e.g.*, *United States* v. *Binder*, 453 F.2d 805, 809 (C.A. 2); *Gollaher* v. *United States*, 419 F.2d 520 (C.A. 9), certiorari denied, 396 U.S. 960; *United States* v. *Capaldo*, 402 F.2d 821 (C.A. 2); *Kitchell* v. *United States*, 354 F.2d 715 (C.A. 1); *Jones* v. *United States*, 342 F.2d 863 (C.A.D.C.).

The grand jury's historic functions survive to this day. "Its responsibilities continue to include * * * the protection of citizens against unfounded criminal prosecutions," *United States* v. *Calandra*, *supra*, 414 U.S. at 343, and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement" (*ibid.*). See also *Branzburg* v. *Hayes*, 408 U.S. 665, 686-700. Indeed, precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long-standing principle that 'the public . . . has a right to every man's evidence' * * * is particularly applicable to grand jury proceedings" (*Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. *Blackmer* v. *United States*, 284 U.S. 421, 438.

The imposition on this constitutional process of the administration of a set of warnings—"not themselves rights protected by the Constitution" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 444)—may tend to discourage citizens from providing the grand jury with information it needs to carry out its functions under the Fifth Amendment. The *Miranda* warnings, however, were never intended to create "a constitutional straitjacket" (*Miranda*, *supra*, 384 U.S. at 467) to be applied across the board to every form of official questioning. To extend the concepts behind that decision "to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contem-

plated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court" (*Mandujano, supra*, plurality op. 15).[9]

B. *Grand Jury Questioning Is No More Coercive Of A "Potential Defendant" Than Of Other Witnesses*

"[S]ince at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of compusion" (*Hoffa* v. *United States*, 385 U.S. 293, 303-304). We submit that a witness's answers before the grand jury are no more likely to be compelled because he is suspected of involvement in the criminal activities that the grand jury is investigating than if he is not, and that accordingly his status as a "potential" defendant has no constitutionally significant bearing on the question whether his testimony has been secured in violation of the Fifth Amendment.

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[9] The *Miranda* Court's careful limitation of its holding highlights the inapplicability of that decision to grand jury proceedings (384 U.S. at 477-478):

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

1. The difficulty of determining who is a "putative" or "potential" defendant highlights the anomaly of basing any warnings requirement on the privilege against self-incrimination. Assuming that some warnings are necessary for such persons, but that the Constitution does not require that they be administered to *every* witness called to testify before the grand jury, some means of identifying the "potential" or "putative" defendants entitled to the warnings must be devised. Yet the likely identification tests—examining either the subjective intent of the prosecutor (see *infra*, pp. 51-52) or the objective state of the evidence already in the government's possession (see Mr. Justice Brennan's concurring opinion in *Mandujano, supra*, pp. 14-15 & n. 15)—are irrelevant to the issue of compulsion. While the "putative defendant" concept may conceivably be helpful in a due process context (but see *infra*, pp. 42-48), we fail to see how the content of the prosecutor's mind or of his files—neither of which is ordinarily known to the witness—has any bearing whatever on the question whether the witness has been unconstitutionally compelled to incriminate himself.

In the *Miranda* context of custodial interrogation the "potential defendant" concept is irrelevant in defining the right to warnings: the presumption of inherent coerciveness applies regardless of whether, at the time of the questioning, the police have any basis for suspecting the interrogatee of a crime, or any intent to prefer charges against him. Similarly, although one suspected of involvement in the type of criminal activity under investigation may face a

greater likelihood that he will be asked questions calling for possibly incriminating responses, the government's mere knowledge or intention with regard to that individual, unaccompanied by any action or procedure that treats him differently from other grand jury witnesses who are called to testify because they also are likely to possess information useful to the grand jury to fulfill its constitutional function, does not make the questioning of a "potential defendant" any more coercive than the questioning of other grand jury witnesses. Such a person may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. He is certainly no more likely to be ignorant of his Fifth Amendment privilege than any other witness, who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person . . . shall be compelled in any criminal case to be a witness against himself . . .'" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 439).

2. Mr. Justice Brennan's view—that a grand jury witness whom the government has probable cause to believe has committed a crime cannot be questioned before the grand jury absent "an intentional and intelligent waiver *** of his known right to be free from compulsory self-incrimination," and that "[s]uch a waiver could readily be demonstrated by proof that the individual was warned prior to questioning ***" (*Mandujano*, *supra*, concurring op. of Mr. Justice Brennan at 14, 16)—appears to be based, not on an analogy to the circumstances of custodial

interrogation that informed *Miranda*, but upon the notion that a knowing and intelligent waiver (and, therefore, a warning) is necessary principally "to enforce the guarantee of an adversary system" (*id.* at 4), of which the Fifth Amendment privilege is the essential mainstay (*id.* at 5).

We respectfully submit that this justification for departing from the "general rule that the privilege must be claimed" (*Garner* v. *United States*, *supra*, at 9) disregards the fact that the relevant inquiry under the Self-Incrimination Clause is whether there has been "genuine compulsion of testimony" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 440). The adversary system is not imperiled, nor the Fifth Amendment violated, unless the government "by *coercion* prove[s] its charge against an accused out of his own mouth" (*Rogers* v. *Richmond*, 365 U.S. 534, 541; emphasis added). The Fifth Amendment does not preclude a grand jury witness from testifying voluntarily in matters which may incriminate him (*United States* v. *Monia*, *supra*, 317 U.S. at 427); on the contrary, "those competent and freewilled to do so may give evidence against the whole world, themselves included" (*United States* v. *Kimball*, 117 Fed. 156, 163 (C.C. S.D.N.Y.)).

Miranda fully recognized that the heart of the matter is compulsion. That case presents the only circumstance in which this Court has ever held that a knowing and intelligent waiver of the privilege against self-incrimination is a prerequisite to the initiation of questioning by the government of an indi-

vidual not yet a defendant in a criminal case.[10] The predicate was the Court's conclusion that custodial interrogation is "inherently compelling" (384 U.S. at 467); that conclusion in turn "was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' 386 U.S., at 455" (*Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, slip op. 6). The grand jury setting, however, as we have just elaborated, is not inherently coercive, and in our view that ought to be dispositive.[11]

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[10] In his concurring opinion in *Mandujano* (p. 3 n. 3), Mr. Justice Brennan seems to suggest, citing *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 238, that this Court in other decisions has insisted on a knowing and intelligent waiver of the privilege prior to questioning in contexts other than custodial interrogation. In *Schneckloth*, however, the Court simply observed that it "has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency or a congressional committee," citing *Smith* v. *United States*, 337 U.S. 137, and *Emspak* v. *United States*, 349 U.S. 190. In those two cases the question was whether an ambiguous statement by the witness had waived his privilege after it had been expressly invoked. In *Smith* the Court three times repeated the rule that the privilege must be claimed (337 U.S. at 147, 148, 150) before holding that "[a] witness cannot properly be held *after claim* to have waived his privilege * * * upon vague and uncertain terms" (*id.* at 150; emphasis added). *Emspak* was similar and deemed controlled by *Smith* (349 U.S. at 196). In neither case did the Court suggest that the witnesses were required to be expressly warned of their rights at the outset of their testimony (or at any other time) notwithstanding that they were clearly "potential defendants" under virtually any definition.

[11] This case does not present, and accordingly we do not discuss, the question whether a *de jure* defendant must be

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advised of his privilege before testifying before a grand jury. Although the lower courts have had occasion to treat the issue (see, *e.g.*, *United States* v. *Scully*, 225 F.2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *Perrone* v. *United States*, 416 F.2d 464, 466 (C.A. 2); *Jones* v. *United States*, 342 F.2d 863, 870 (C.A.D.C.); *Mulloney* v. *United States*, 79 F.2d 566, 579 (C.A. 1); *United States* v. *Kimball*, *supra*), this Court has never squarely passed upon it. In *United States* v. *Calandra*, 414 U.S. 338, in holding that a grand jury witness could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure, the Court noted in *dicta* that a grand jury indictment valid on its face was immune from most sorts of challenges, even one alleging that it was based on evidence gained in violation of the defendant's Fifth Amendment privilege, citing *Lawn* v. *United States*, 355 U.S. 339 (414 U.S. at 345, 346). Thus *Calandra* cannot be said to have faced, let alone decided, whether a knowing and intelligent waiver is necessary before an actual defendant may be called before the grand jury.

In *Lawn* the defendant had first been charged by way of an information. He was then called to testify about the offense before a grand jury, which, acting on the basis of evidence obtained from him during his testimony, indicted him for a more serious crime relating to the same unlawful activity. The district court quashed the indictment on the ground that the defendant's privilege had been violated. 115 F. Supp. 674 (S.D. N.Y.). The government's appeal of that decision was dismissed as untimely. See *United States* v. *Giglio*, 232 F.2d 589, 594 n. 3 (C.A. 2). The government then secured another indictment against the defendant from a subsequent grand jury before which the defendant was not called, and the defendant was tried and convicted on that indictment. On appeal (*United States* v. *Giglio*, *supra*) and in this Court (*sub nom. Lawn* v. *United States*), the question was whether the defendant had satisfactorily shown that the second indictment had been based on evidence—assumed without discussion to be tainted (see *Giglio*, *supra*, 232 F.2d at 594 n. 3)—garnered from the first. The district court's earlier, unappealed ruling that the defendant's privilege had been violated by his appearance before the grand jury without warnings and waiver was by then the law of the case and was not a

Moreover, not every incident that eases the government's burden under our adversary system makes the system unconstitutionally inquisitorial. Nothing so tempers the adversary process, for example, as a voluntary confession or guilty plea. Thus, although the Fifth Amendment privilege against compulsory self-incrimination may have as one of its purposes the preservation of the adversary system (*United States* v. *Calandra*, *supra*, 414 U.S. at 343), that is not its sole purpose (*ibid.*). The privilege and the adversary system are not identities; and an event that diminishes the adversarial context of criminal proceedings does not necessarily violate the privilege as well.

3. There is some support in *dicta* in *Garner* v. *United States*, *supra* (slip op. 10, 13) for Mr. Justice Brennan's view (concurring op. in *Mandujano*, pp. 8-9) that a knowing and intelligent waiver of the privilege against self-incrimination is required whenever the government is on notice that the questions it plans to ask are likely to result, if answered, in incriminating evidence.[12] That language notwith-

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matter of contest. Thus this Court's decision in *Lawn* neither addressed nor settled the question whether a knowing and intelligent waiver is required when a defendant is called before the grand jury.

[12] We believe that this factor is actually relevant, not to the question whether particular statements have been compelled, but to the question whether statements that are deemed to have been compelled might nevertheless be used against their author. See *California* v. *Byers*, 402 U.S. 424, 427-431 (opinion of Chief Justice Burger).

standing, the clear holding in *Beckwith* v. *United States*, *supra*, established beyond peradventure that whether a person has been compelled within the meaning of the Fifth Amendment, or whether certain situations can be said to be inherently coercive, has nothing to do with "the strength or content of the government's suspicions at the time the questioning was conducted" (*United States* v. *Caiello*, 420 F.2d 471, 473 (C.A. 2), quoted in *Beckwith*, *supra*, slip op. 6).

Beckwith had been interviewed in the home of a friend by agents of the Internal Revenue Service investigating potential criminal tax violations. By virtue of the government's knowledge and suspicions, it was clear that Beckwith was the "focus" of a criminal investigation. He contended in this Court that he was therefore placed in the functional and legal equivalent of the *Miranda* situation by the interview and should have received full *Miranda* warnings. The Court rejected the argument, ruling that *Miranda* had required a knowing and intelligent waiver—and therefore warnings—because the circumstances of custodial interrogation were deemed inherently coercive, not because of any threat to the privilege against compulsory self-incrimination posed by the subject matter of the interview (slip op. 6). See also *United States* v. *Hall*, 421 F.2d 540, 544 (C.A. 2) (Friendly, J.); *Lowe* v. *United States*, 407 F.2d 1391 (C.A. 9); *United States* v. *Sicilia*, 475 F.2d 308 (C.A. 7).

Beckwith, not *Miranda*, controls this case. As we have set forth above (pp. 22-28, *supra*), the setting

and circumstances of grand jury proceedings are not inherently coercive, and therefore there is no need to depart in the grand jury context from the long-standing requirement that a witness must claim his privilege against compulsory self-incrimination or lose its benefit.[13]

III. Whether Or Not Some Witnesses Are Entitled To Be Advised Of Their Privilege Against Compulsory Self-Incrimination, "Putative Defendant" Warnings Are Not Constitutionally Required

A. *The Self-Incrimination Clause Provides No Basis For Imposing A Requirement That "Potential Defendants" Receive "Target" Warnings*

It is undisputed that the government attorney in charge of the grand jury investigation in this case gave respondent full *Miranda* warnings before asking him any questions in front of the grand jury (*infra*,

[13] This does not mean that grand jury witnesses are left unprotected from any coercive practices that may be discovered in particular cases. A grand jury interrogation, like any other noncustodial interrogation, "might possibly in some situations, by virtue of some special circumstances, be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear [an individual's] will to resist and bring about confessions not freely self-determined . . . .' *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961)" (*Beckwith, supra*, at 7). In such cases it will be the duty of a reviewing court to examine the entire record and independently determine whether the questioning was in fact unconstitutionally coercive. The presence or absence of warnings in such cases, however, while relevant evidence going to the ultimate issue, should not by itself be controlling. See *Beckwith, supra*, slip op. 7.

pp. 5-6; A. 3-4).[14] The trial court nonetheless found these warnings insufficient to protect respondent's privilege against compulsory self-incrimination and ruled, in addition, that the prosecutor should have told respondent that anything he said "could result in [your] indictment by this very Grand Jury that you're testifying before and that thereafter you would be required to stand trial in a criminal court on prose-

[14] Since respondent received a full panoply of *Miranda* warnings to which individuals facing custodial interrogation are entitled, this case does not squarely present the question whether, assuming that some advice regarding the self-incrimination privilege is required, the aspects of *Miranda* warnings that refer to a "right to remain silent" and a right to appointed counsel are appropriate in the grand jury context. The courts of appeals that have held some warnings regarding the privilege to be constitutionally required have not uniformly delineated the necessary components of such warnings. Compare the Fifth Circuit decision in *Mandujano* (496 F.2d 1050; holding that the full litany of *Miranda* warnings is required) with *United States* v. *Luxenberg*, 374 F.2d 241 (C.A. 6) (no mention of "right to silence" or of a right to appointed counsel), and with *United States* v. *Wong*, *supra* (C.A. 9) (no mention of a right to counsel). For the reasons stated at pages 32-40 of our brief in *Mandujano*, to which we respectfully refer the Court should it hold that some warnings are necessary and deem it appropriate to settle the uncertainty regarding the appropriate composition of such warnings, we believe that grand jury witnesses—even those who are "putative" or "potential" defendants—have no constitutional right to remain silent or to appointed counsel, and that full *Miranda* warnings would accordingly be inappropriate in the grand jury setting, whatever other warnings regarding the self-incrimination provision might be held to be required. See *Mandujano, supra* (plurality op. 16-17).

cution for a criminal offense and whatever you say here could at that time be used against you" (A. 67-68). In affirming, the court of appeals agreed with the trial court "that the most significant failing of the prosecutor was in not advising [respondent] that he was a potential defendant" (Pet. App. 3a).[15]

If, as we have argued above, the Self-Incrimination Clause does not require warnings regarding the privilege, then it follows that it does not require "target" warnings or "potential defendant" warnings either: a grand jury witness is surely not more coerced by the government's failure to advise him of his "putative" or "potential" defendant status than by the

[15] The court of appeals did not indicate, apart from its statement (Pet. App. 3a) that the government failed "to maintain a scrupulous concern that waiver must be knowingly and intelligently made," whether or not it endorsed the trial court's ruling (Pet. App. 20a; A. 71) that the government was obliged not only to administer full *Miranda* warnings and a "target" warning, but also to question respondent "to determine what his educational background is, and what his formal education is, and whether or not he understands that this is a constitutional privilege * * * and the consequences of what might result in the event that he does waive" it. The trial court cited no authority in support of this ruling, and we know of none. A witness's educational background and capacity for understanding any warnings that might be held to be required would be conceivably relevant to a claim of involuntariness, but there is no constitutional basis, we submit, for requiring additional prophylactic inquiries into these matters by the government as a necessary prerequisite to a knowing and intelligent waiver, assuming one is required.

failure to advise him of his privilege against compulsory self-incrimination.[16]

At the very least, the Self-Incrimination Clause cannot reasonably be held to require a "putative defendant" warning on top of full *Miranda* warnings (or any warnings regarding the privilege).[17]

[16] Standard 3.6(d) of the ABA Standards for Criminal Justice, *The Prosecution Function* (Approved Draft, 1971), relied upon by the court of appeals (Pet. App. 4a), states that a prosecutor should not seek to compel the testimony of a witness he believes to be a "potential defendant" "without informing him that he may be charged and that he should seek independent legal advice concerning his rights." Presumably the admonition to seek independent legal advice is considered effective to assure that the witness is apprised of his privilege against self-incrimination; thus the ABA Standard, like the court of appeals' decision, in effect requires both a warning designed to advise the witness of his privilege and a "target" warning on top of that. Such warnings are said to be required by "due regard for the privilege against self incrimination and the right to counsel" (Commentary to Standard 3.6). We elaborate in the text why we believe that the Fifth Amendment requires no such warnings, and at pages 37-39 of our brief in *Mandujano* we argue that there is no Sixth Amendment right to counsel in grand jury proceedings (a question that need not be addressed in this case, given that the court of appeals did not mention the Sixth Amendment and appears to have relied exclusively on the Fifth Amendment for its holding).

[17] To the best of our knowledge, no other court that has required some form of Fifth Amendment warning has ever held that a "putative" or "potential" defendant is also constitutionally entitled to be warned that he is a suspect. Several cases are squarely to the contrary, *e.g.*, *United States* v. *Binder*, *supra*, 453 F.2d at 810; *United States* v. *Mitchell*, 372 F. Supp. 1239, 1248 (S.D. N.Y.); *United States* v. *Potash*, 332 F. Supp. 730, 733 (S.D. N.Y.) (Weinfeld, J.); *United*

Only if there is some element of coerciveness inherent in grand jury proceedings that cannot be cured by some form of advice of rights would such an additional warning be justified. Whether or not the Court accepts our position that questioning before the grand jury is not inherently coercive, it seems to us beyond dispute that the grand jury setting is no *more* coercive than police custody, where such additional warning is not required. Thus, "[i]f [*Miranda*] warnings are adequate to protect a defendant in the hostile environment of custodial interrogation[,] they are surely sufficient with a witness appearing before a grand jury of citizens to be questioned by a government attorney, with a record of the proceedings made by a stenographer." *United States* v. *Binder*, *supra*, 453 F.2d at 810 (Lumbard, J.).

In most instances witnesses are likely to have equally as good, if not a far better, idea than the prosecutor or the grand jury of whether they are indeed "potential defendants," making a warning to this effect doubly unnecessary as a matter of constitutional law. See *United States* v. *Potash*, 332 F. Supp. 730, 733 (S.D. N.Y.); *United States* v. *Kim-*

States v. *Owens-Corning Fiberglas Corp.*, 271 F. Supp. 561, 566-567 (N.D. Cal.); *United States* v. *Kimball*, *supra*, 117 Fed. at 166-167; see also *United States* v. *Del Toro*, 513 F.2d 656, 664 (C.A. 2).

In *United States* v. *Jacobs*, 531 F.2d 87 (C.A. 2), ruling on the basis of its "supervisory powers" rather than under the Constitution, the court affirmed the suppression of the defendant's allegedly perjurious grand jury testimony on the ground that she had not been warned that she was a "putative defendant." The court did not decide what, if any, warnings

ball, *supra*.[18] In the present case respondent had had his self-incrimination privilege expressly called to his attention and had been explicitly warned that anything he said might be used against him. He knew that the grand jury was investigating a crime with which he had had some connection and that his connection was known to the authorities by virtue of his own previously volunteered statements.[19] The police officer to whom respondent first related his story had told him that it was unbelievable and that if he repeated it in court it was likely to get him into trouble

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are required by the Constitution. Rather, having learned that federal prosecutors in the Second Circuit generally follow the practice of giving "putative defendant" warnings, the court ordered the testimony suppressed "[i]n the interest of uniformity in criminal procedure within the circuit" (531 F.2d at 90). The government's petition for review of this decision is now pending in this Court (No. 75-1883).

[18] "If the danger of indictment was so clearly known to anybody, it was known peculiarly to the defendants, if the allegations of the indictment be accepted as true; for they were in such case the very actors. The grand jury was merely investigating. Knowledge on its part, or that of the United States attorney, came no faster than the witnesses having the information revealed it. * * * The jury knew, and they did not, is the present plea; and they did not refuse to testify because they did not understand that they were in peril of indictment. Such contention is idle on its face * * *. * * * The jury began in darkness, and came by degrees to the light which, in its view, revealed these defendants as wrongdoers." *Kimball*, *supra*, 117 Fed. at 166.

[19] In this respect the instant case is unlike *Mandujano*, *Wong*, or *Jacobs*, in all of which the defendants were unaware at the time of their grand jury testimony of the extent of the potentially incriminating evidence in the government's possession.

(A. 36). In holding, under these circumstances, that respondent was constitutionally entitled not only to *Miranda* warnings but also to an additional "putative" or "potential" defendant warning—a warning that is in our view far removed from the governmental obligation to guard against compulsion of self-incriminating statements—the decision below transmutes the Fifth Amendment policy against compulsion into a general policy to discourage admissions or statements of any kind to the grand jury.

B. *The Failure To Give Respondent A "Target" Warning Did Not Violate The Due Process Clause*

Although the court of appeals in the present case did not purport to rest its decision on due process grounds, it seems inescapable that its decision was rooted to some degree in the notion (expressly stated in other cases requiring warnings regarding the self-incrimination privilege)[20] that it is somehow unfair to call persons to testify before the grand jury when the government has evidence suggesting that they might be subject to criminal prosecution and when the interrogation is likely to encompass inquiry into areas where truthful responses could prove incriminating.

The only conceivable "fairness" rationale for a "target" warnings requirement, however, is that such a warning might have an impact on the witness's

[20] See the courts of appeals' decisions in *Mandujano* (496 F.2d 1050, 1058) and *United States* v. *Wong*, C.A. 9, No. 74-1636, *supra*.

evaluation of whether to testify or to invoke his privilege—a decisionmaking process that is afforded all the constitutional protection to which it is entitled by the Self-Incrimination Clause. Thus the Due Process Clause contributes nothing to the resolution of the question whether warnings of any nature—whether of the privilege or of "potential defendant" status—are required.

Assuming, however, that there are other policies implicated by the Due Process Clause, independent of the constitutional policy against compulsion, that might bear upon grand jury witnesses' entitlement to warnings of some sort, we submit that there is nothing unfair in the failure to administer "target" warnings to witnesses such as respondent and that therefore there is no basis for holding them to be required by due process considerations. As we suggested above, witnesses who are actually "putative defendants" know better than anyone else whether they have committed the crime or crimes that the grand jury is investigating. Only in the most extraordinary circumstance—as, for example, when a grand jury witness does not know that he has committed a crime—will a witness learn of his "putative defendant" status later than the prosecutor, and even in those rare cases it will not automatically follow from the witness's ignorance of his lawbreaking that the prosecutor's failure to apprise him was so unfair as to violate due process.[21]

[21] Cf. *United States* v. *Kimball*, *supra*: "Cases have undoubtedly arisen where persons have been called to give evidence

Moreover, even if a witness is a prime target, he may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury. See *United States* v. *Winter*, 348 F.2d 204 (C.A. 2), certiorari denied, 392 U.S. 955. In those circumstances, it can hardly be said to have been fundamentally unfair for the government to have summoned and questioned the witness without giving a "putative defendant" or "target" warning.

The facts of the present case do not show anything approaching a due process violation. Respondent sought the release of his truck from Assistant United States Attorney Stuckey, who questioned him about the circumstances of the stolen motorcycle's presence and found questionable respondent's explanation that it had been abandoned by a stranger to whom he had given a ride (A. 44-48). The circumstances of their conversation were harried and rushed (A. 46-47), and

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under such circumstances of ignorance of law, fact, and the occasion of their presence as to amount to misconduct on the part of the grand jury or prosecuting officer in using the same as a basis for indictment, and such instances will arise in the future. Then the courts will meet the facts according to their deserving" (117 Fed. at 166).

Nor can the government be said to "entrap" individuals suspected of crime by calling them before the grand jury without giving "target" warnings (cf. *United States* v. *Mandujano*, 496 F.2d 1050, 1058 n.8). Entrapment exists only when government officials "implant in the mind of an innocent person the disposition to commit" an offense (*Sorrells* v. *United States*, 287 U.S. 435, 442; *United States* v. *Russell*, 411 U.S. 423, 436).

Assistant Stuckey did not at that time have a clear notion of what the case was about (A. 46). His sense that something was amiss with respondent's explanation, and his fear that respondent might not return voluntarily to testify about his friends before the grand jury, prompted him to serve respondent with a subpoena to assure his appearance (A. 46, 48). This was clearly no abuse of the grand jury procedure: a crime had been committed and respondent by his own volunteered statements had demonstrated himself to be peculiarly knowledgeable about circumstances surrounding the crime.

Assistant United States Attorney Shine, who was conducting the grand jury proceedings on the day respondent appeared to testify, followed his usual practice of warning witnesses whom he considered might be indicted of their rights, but he himself had no fixed intention to seek an indictment against respondent (A. 57-58):

> My reaction to that story was that "I'm not sure whether the Grand Jury is going to believe it," and so as a matter of precaution I just thought that I would be overly cautious and warn him of his rights before he testified.
>
> Before I put him in the Grand Jury and was able to in detail question him about the circumstances of how he became in possession of the truck, I did not know whether his was a believable story that he did not know that the motorcycle was stolen and was put in his truck and nor therefore did the two men who were arrested later in possession of this truck and the

motorcycle, and so as a matter of precaution and not because I had any belief at that time that he was confessing to any offense, but as a matter of precaution, I decided to warn him of his rights.

Q And so you then envisioned the possibility that the Grand Jury may indict him on this charge, is that right?

A I thought that the Grand Jury might conceivably disbelieve him and decide that when he took, if he admitted that he took possession of the motorcycle while he was in possession of the truck that they could decide to indict him. It would be a matter for the community, that is, the Grand Jury.

Q From the story that you knew or the statement that you knew that he had already made you thought there was a possibility? If he had given the same statement which he had previously given to Mr. Stuckey, you knew there was a possibility that he could be indicted?

A Yes, of course. That's why I warned him of his rights. What I'm saying to you is that I had not decided, I in my own mind as a prosecutor had not decided, that this man was going to be indicted. He had an explanation about how the motorcycle got into the truck which might result in all three men, himself and the other two men, being ignored by the Grand Jury and the whole matter being closed.

On the other hand, I was interested in presenting the whole matter to the Grand Jury so they could decide whether to ignore all three men or indict the two men who were arrested in possession of the truck or indict Mr. Washington by himself or do what they chose on whatever they decided to believe having heard the testimony of Mr. Washington.

Assistant Shine also testified that respondent said that he understood the warnings he received and appeared fully to have comprehended them, that respondent also appeared to have had no difficulty understanding the questions that were put to him, and that respondent had indicated no reluctance to answer any of the questions asked (A. 52-53).

None of the foregoing was controverted, and respondent offered no other evidence that would show that the government's conduct in this case, designed primarily to aid the grand jury in ascertaining whether a crime had been committed and if so by whom, either subjected him to any hardship or violated any of his fundamental rights. Nor did the government deceive him, or in any way participate in an unlawful practice.[22] Cf. *Lewis* v. *United States*,

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[22] The court of appeals stated (Pet. App. 3a), in commenting on the government's failure to advise respondent that he was a "potential defendant," that he "was only told that he was needed [to testify] as a witness in prosecuting the two who were occupants of the van at the time of its impoundment." Apparently this was a reference to the statement by Assistant United States Attorney Stuckey (who served respondent with the subpoena for his grand jury appearance) during the suppression hearing (A. 45) that "I think I might even have told him, of course, that he would be needed as a witness and I would give him a subpoena." Nothing in this statement, or in any other made by Stuckey, indicates that respondent was in any way misled by the government into believing that he was in fact *not* a potential defendant, or indeed that the government sought his testimony

385 U.S. 206. At the time of the questioning, respondent knew what particular crime the grand jury was investigating; knew that he had some connection with the crime and perhaps the criminal or criminals; knew that the authorities were aware of his involvement; and knew that his innocent explanation of his involvement had been found incredible by the police officer to whom he had first related it. In these circumstances the government's failure expressly to advise respondent that he was a potential defendant can hardly be said to violate "fundamental fairness" or be "shocking to the universal sense of justice" (*Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 246).

In addition to lacking the necessary constitutional underpinning, the effort to provide special rules regulating the treatment of certain categories of grand jury witnesses on the basis of their status as "potential" or "putative" defendants is undesirable as a matter of policy as well. If the grand jury is to have any realistic hope of succeeding in the mission of ferreting out unreported crime and corruption, it is critically dependent on the ability to obtain information from witnesses (such as the respondent herein) who, by virtue of their involvement in or at the fringes of the activities under investigation, are most likely to

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solely in connection with a contemplated prosecution of Zimmerman and Woodard. In fact, Stuckey also testified (A. 47), "I think I might have voiced [the doubts he entertained about respondent's explanation of the motocycle's presence] to him at the time that it didn't make sense," and "I think I did [confront him with those doubts]."

possess the kind of information that is indispensable to a successful inquiry. *United States* v. *Sweig*, 441 F.2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932. In many instances the government will have no fixed intention of prosecuting such witnesses at the time they are called to testify, and indeed in some cases a witness's cooperation with the grand jury investigation may actually enhance the witness's chances of not being prosecuted. In all events, the grand jury's constitutional function is likely to be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses.

Substantial problems also surround the identification of the witnesses who may be entitled to such warnings as may be required. An objective test, looking only to whether there was some quantum of incriminating evidence concerning the witness that was available to the prosecutor prior to questioning (see Mr. Justice Brennan's concurring opinion in *Mandujano*, *supra*, pp. 14-15 n. 15, and the lower court decisions in that case), would pose numerous and varied problems for both prosecutors and courts. If an attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness and therefore fails to administer appropriate warnings, the penalty may be the forfeit of society's ability to bring criminal conduct to task. Conversely, the ordinary witness given *Miranda* warnings as a precaution against the possibility of a subsequent determination that he had been a "putative defendant" may be inhibited from

providing the grand jury with useful or needed evidence (perhaps out of fear that he is indeed a prospective defendant). Commentators have stressed the problems inherent in the so-called "objective" test for determining who is a "putative defendant" at the time of grand jury questioning:

> The widespread and intricate investigations by federal grand juries * * * do not lend themselves to simple tests of "focus" or "purpose" or even "probable cause." The existence of probable cause may conceivably be determined after analysis of a lengthy record, but when the grand jurors or prosecutors have not yet analyzed their record, * * * they may not realize it. Yet hindsight * * * particularly if the test is to be objective, could serve to vitiate much of their work by suppressing testimony taken [while the record is being made]. [Enker and Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 74 (1964).][23]

[23] This highlights an important distinction in the types of grand jury inquiries that can exist. Sometimes there is a known and reported crime (perhaps an assault or a bank robbery) and the grand jury is convened for the purpose of considering indictment of a particular suspect; in such a context an objective "putative defendant" concept may be adequate. In many other cases, however, the grand jury's efforts are directed toward uncovering the very existence of secret criminal activity (*e.g.*, most probes of official corruption, broad-based inquiries into narcotics trafficking or extortionate credit transactions, or the like). In such instances, the "objective" standard for defining "putative defendants" is inappropriate in fact and likely to be destructive of the effective functioning of the grand jury.

Moreover, given the consequences to the government of a mistaken appraisal or appreciation of the amount or meaning of the evidence against a particular witness that it does possess, an objective test would in effect bring every grand jury witness against whom the government has any potentially incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no actual intention of seeking an indictment—because the witness (perhaps occupying a lower echelon of an ongoing criminal enterprise) is more valuable as a source of evidence against others; because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him; or because the evidence is deemed inadequate to indict. Indeed, an objective test would discourage the cooperation of precisely those witnesses whose knowledge of illegal activities is most crucial to the grand jury's efforts to determine whether crimes have been committed and, if so, who is involved.

Thus, assuming that some warnings are required in the grand jury context, the witnesses entitled to receive them should be identified according to a subjective as well as an objective standard, with principal emphasis on the former. That is, it must be established both that the witness was in fact a target of the grand jury investigation whom the government attorney expected to be indicted (or anticipated might be indicted, as in this case), and that the government possessed substantial evidence to support

an indictment at the time the witness appeared to testify before the grand jury. Indeed, to the degree that any warnings requirement that may be imposed is based on considerations of due process and fairness, it would seem that the prosecutor's state of mind would be a principal, if not the essential, subject of inquiry into the propriety of the government's conduct with respect to individual witnesses. Although the prosecutor's intentions are irrelevant to the question whether the Self-Incrimination Clause requires that certain witnesses be warned of their constitutional privilege (*supra*, pp. 29, 34-36), it would seem to us anomalous to find governmental misconduct amounting to a denial of due process in a case where, although in hindsight it appears to a court that the government's cumulative evidence against a grand jury witness was so incriminating as to require warnings, the government attorney's failure to administer warnings stemmed from his belief, based on a good faith appraisal of the evidence known (and reasonably knowable) to him, that none was necessary.

IV. Even If Warnings Are Required, It Is Not Necessary That They Be Given Out Of The Presence Of The Grand Jury

The court of appeals ruled that, by "waiting until after administering the oath in the cloister of the grand jury before undertaking to furnish" *Miranda* warnings to respondent, the government prosecutor had rendered the warnings inadequate to protect respondent's privilege against compulsory self-incrim-

ination (Pet. App. 3a).[24] Although the court articulated no reasons for requiring that warnings be given out of the presence of the grand jury, nor suggested what interval between warnings and questioning would pass constitutional muster, presumably its holding reflected a concern that the prosecutor had delayed administering them until a point at which—due either to the presence of the grand jury itself or to the imminency of questioning—their receipt would be ineffective.[25]

In our view, even assuming that the Constitution requires that some warnings be given, it does not

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[24] The trial court was similarly concerned "that no counselling * * * was provided by the Assistant United States Attorney to [respondent] before entering the Grand Jury room, nor was any other action taken by the Assistant United States Attorney to assure that [respondent], before entering the Grand Jury room, understood and appreciated in the light of his background and educational qualifications the potential impact involved in a waiver of Fifth Amendment rights * * *" (A. 70-71).

[25] That is the import of the view summarily expressed by a minority of the court in *Jones* v. *United States*, 342 F.2d 863, 869-870 (C.A.D.C.) (*en banc*), cited by the court below (Pet. App. 4a).

Standard 3.6 of the ABA Project on Standards for Criminal Justice, *The Prosecution Function*, which the court also cited (Pet. App. 3a-4a), reflects the view that the prosecutor should not call before the grand jury a witness who has declared his intention to invoke his privilege against compulsory self-incrimination—since, it is said, "the very exercise of the privilege may prejudice the witness in the eyes of the grand jury" (see Commentary to Standard 3.6). The Standards reflect no policy against administering the warnings in the presence of the grand jury, however, and we do not understand

forbid their administration in the presence of the grand jury. There is no evidence in this case to indicate that the warnings respondent received were not given in time effectively to apprise him of his rights, and neither respondent, the trial court, nor the court of appeals cited any evidence in support of the belief that as a general matter warnings given in the presence of the grand jury are ineffectual *per se*. Indeed, it would seem equally if not more plausible that the issuance of warnings in front of the grand jury immediately preceding questioning would be *most* effective, since that would be the time nearest when the witness must actually decide whether to invoke the privilege or answer questions. Moreover, the presence of the jurymen and reporter might assure that the warnings are administered accurately and lend spe-

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the court of appeals' holding in the present case to have been based on a fear that the administration of warnings "in the cloister of the grand jury" somehow prejudiced the grand jury against respondent. Such a fear, in our view, would be unfounded in any event. If the witness testifies forthrightly after administration of warnings in front of the grand jury, then any suggestion arising from the warnings that the witness had something to hide will have been negated. If, on the other hand, the witness invokes his privilege, then the grand jury is probably less likely to draw improper adverse inferences than if the government attorney had not in their presence specifically advised the witness that the constitutional privilege might be invoked. In either case prejudice on the part of the grand jury *from the warnings alone* (respondent never invoked his privilege, and thus could not have suffered any prejudice on that account) is not so likely, or, if present, likely to be of such magnitude, to require as a matter of constitutional law that whatever warnings are necessary must be administered out of the grand jury's presence.

cial gravity to the prosecutor's words in the mind of the witness. At the very least, we submit, the record below contains no indication that the deliberative atmosphere of the grand jury room is any less conducive to rational decisionmaking on the part of the witness than the courthouse hallway or the prosecutor's office. Accordingly, the imposition of a constitutional requirement that such warnings as may be deemed necessary must be given out of the presence of the grand jury was unwarranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1106

UNITED STATES OF AMERICA,

Petitioner,

v.

GREGORY V. WASHINGTON,

Respondent.

ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT

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ON A WRIT OF CERTIORARI TO THE
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BRIEF FOR THE RESPONDENT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Government may, consistent with the Fifth Amendment privilege against self-incrimination, use the compulsion of a judicial subpoena and the threat of contempt to compel an uncounseled putative defendant to give self-incriminating testimony before the grand jury that is deciding whether to indict him, without advising him of his Fifth Amendment rights

and obtaining from him, prior to his grand jury appearance, a voluntary, knowing and intelligent waiver of those rights.

2. Whether subpoenaing an uncounseled putative defendant to the grand jury that is deciding whether he should be indicted and interrogating him under oath before that grand jury without telling him that he might be indicted by that very grand jury and that he has a right not to answer to grand jury's incriminating questions violates the Due Process Clause.

COUNTERSTATEMENT

Respondent accepts petitioner's Statement as substantially accurate and complete. It is only necessary here to emphasize a few facts which respondent considers critical to the disposition of this case.

1. A police officer and two prosecutors doubted the truthfulness of respondent's innocent explanation of the presence of a stolen motorcycle discovered in his van. (A. 36, 48, 57).

2. Respondent was subpoenaed to the grand jury by the Government for the purpose of having the grand jury decide, after hearing his testimony, whether he should be indicted for the theft of the motorcycle. (A. 48, 57-58).

3. The prosecutor who subpoenaed respondent to the grand jury did not tell him that he was a suspect in the case, that he might be indicted by the very grand jury he was being ordered to appear before, that he had a right not to answer the grand jury's incriminating questions or that he should (or might wish to) consult with a lawyer prior to this grand jury appearance. In fact, it appears that this prosecutor told respondent only that he was needed "as a witness" in the grand jury's ongoing investigation involving his two friends

who had been arrested in his van at the time the stolen motorcycle was discovered. (A. 45).

4. Respondent is legally indigent. He appeared at the grand jury without a lawyer.

5. The prosecutor conducting the grand jury had reviewed the case and expected that the grand jury might disbelieve respondent's testimony and indict him for the theft of the motorcycle. Nevertheless, this prosecutor did not advise respondent of any rights prior to taking him before the grand jury. (A. 50, 58).

6. After taking respondent inside the grand jury room and swearing him as a witness, the prosecutor, for the first time, gave respondent a modified version of the so-called "*Miranda* warnings." The prosecutor told respondent that he "was not under arrest" but was "just [there] by way of subpoena." (A. 3). The prosecutor told respondent that he had a "right to remain silent" and that anything he said could be used against him "in court." (A. 4). The prosecutor did *not* tell respondent that he was a suspect or that anything he said could be used against him "in the grand jury." The prosecutor did *not* tell respondent what a grand jury was or that there was a substantial likelihood that the grand jury would, based on his own testimony, indict him and thereby launch a criminal prosecution of him in connection with the theft of the motorcycle. When asked if he wanted a lawyer respondent said "No, I don't think so." (A. 4). Respondent acknowledged the warnings and proceeded to answer questions before the grand jury, all of which, as it turned out, were incriminating.

7. Based solely on his own testimony and the fact that a stolen motorcycle was discovered in a van being operated by two others but registered to him, the grand jury indicted respondent for grand larceny and receiving stolen property. (A. 71).

8. Two lower courts have held that respondent was a suspect or putative defendant at the time of his compelled appearance before the grand jury that indicted him and that he did not voluntarily, knowingly and intelligently waive his Fifth Amendment privilege against self-incrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this case is whether an uncounseled putative defendant who is subpoenaed to the grand jury for the express purpose of having the grand jury decide, after hearing his testimony, whether or not to indict him is to be treated like an ordinary witness, bound by the rule that a witness who fails to assert his Fifth Amendment privilege at the time he makes incriminating disclosures may not later claim that those disclosures were "compelled" within the meaning of the Fifth Amendment. The Government does not argue that putative defendants subpoenaed to the grand jury do not have a Fifth Amendment privilege to assert, since, by definition, their compelled testimony will incriminate them. Indeed, the Government concedes that respondent had a right to refuse to answer every one of the grand jury's questions relating to the stolen motorcycle found in his van. The Government argues only that respondent, who was indigent and appeared at the grand jury without counsel, was not entitled to be told about that right; according to the Government, if the prosecutor is fortunate enough to compel self-incriminating testimony from uncounseled putative defendants who are ignorant of their rights, he should not be deprived of his fruits as long as such testimony was "voluntarily" given, whether or not it was the product of a voluntary, knowing and intelligent waiver of the Fifth Amendment privilege.

Respondent contends that this Court's analysis last term in *Garner v. United States*, 424 U.S. 648 (1976), is dispositive of the issues presented by this case. While a witness under compulsion to make disclosures ordinarily must put the Government on notice by claiming the privilege or he will not later be heard to assert that he was "compelled" to incriminate himself, the Government may not deliberately seek to avoid the burdens of the adversary system by compelling self-incriminating disclosures from putative defendants who it knows in advance will incriminate themselves by making such disclosures and then attempt to fall back on the rule that the putative defendant's failure to claim the privilege bars its later assertion. This is particularly true where, as here, the object of the governmental compulsion to incriminate is a putative defendant who is indigent and is therefore not represented by counsel.

Having stated what respondent's position is, we should be quick to state what respondent's position is not. Respondent does not contend that every witness subpoenaed to testify before a grand jury has a right to refuse to testify or a right to warnings. It is the clear duty of every citizen to assist the police and grand juries in their investigation of crime and to obey subpoenas to testify. *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973); *Blair v. United States*, 250 U.S. 273 (1919). Thus, if a witness whom the Government is not investigating and has no reason to suspect of criminal involvement in the matters under investigation is subpoenaed to the grand jury, he has no right not to answer questions or to a lawyer and, of course, no right to warnings of these non-existent rights. If such a witness does give incriminating testimony without claiming the privilege, no exclusionary rule would prevent the Government from indicting the witness or using his grand jury testimony at trial.[1]

[1] It is respondent's position that as soon as the uncounseled non-target witness begins to incriminate himself before the grand jury, the prosecutor would then have an obligation to stop questioning the witness and advise him of his rights outside the presence of the grand jury.

Nor does respondent contend that putative defendants or target witnesses may under no circumstances be subpoenaed to testify before a grand jury, although there is some support in the cases for such a contention. See *Jones v. United States*, 342 F.2d 863, 867-68 (D.C. Cir. 1964) (*en banc*); *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955); cf. *United States v. Scully*, 225 F.2d 113, 116 (2nd Cir. 1955), *cert. denied*, 350 U.S. 897; but see *United States v. Dionisio*, *supra*, 410 U.S. at 10 n.8. For purposes of this case respondent assumes, *arguendo*, that a target witness or putative defendant can be subpoenaed to testify before the grand jury and be interrogated if, before appearing in front of the grand jury, the witness is fully and adequately advised of his Fifth Amendment rights and voluntarily, knowingly and intelligently waives those rights.

But at least when the grand jury has focused on a person as a potential target for indictment, and subpoenas him for the express purpose of deciding, after hearing his testimony, whether or not to indict him, that person is compelled to incriminate himself within the meaning of the Fifth Amendment, and the Government may not use his compelled self-incriminating testimony against him at trial absent proof of a voluntary, knowing and intelligent waiver. Two lower courts have held that respondent did not validly waive his privilege when he testified at the grand jury without counsel and under the compulsion of a judicial subpoena, because he was never told that *he* was a target of the grand jury's inquiry or that *he* might be indicted based on his own testimony, and because what little advice he was given regarding his Fifth Amendment rights was not given until he was inside the grand jury room and sworn as a witness.

Respondent submits that these findings by the two lower courts should not be disturbed. No purported

waiver can meet the test of "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), if the uncounseled putative defendant is not told and does not know that he is a target for indictment. Nor can any purported waiver be considered truly voluntary if the uncounseled putative defendant is not given any advice regarding his Fifth Amendment privilege until he is sworn as a witness and face to face with the grand jurors, who sit simultaneously as his triers of fact and potential accusers. Moreover, requiring the putative defendant to assert the privilege in front of the grand jury itself, thereby inviting the grand jury to infer his guilt solely from his exercise of his Fifth Amendment rights, runs afoul of the doctrine of *Griffin v. California*, 380 U.S. 609, 614 (1965), and other cases which preclude attaching a price to the exercise of the privilege.

Whether or not giving an uncounseled putative defendant his Fifth Amendment advice outside the presence of the grand jury should always be required as an essential prerequisite of an effective waiver, the Court of Appeals and the Superior Court were certainly correct in considering the time and place of the advice, along with the failure to advise respondent that he was a target of the grand jury, as factors to be weighed in determining whether respondent's decision to testify before the grand jury constituted a voluntary, knowing and intelligent waiver of his Fifth Amendment privilege. The Government has not argued that respondent did validly waive his privilege, arguing instead that absent a specific claim of the privilege by an uncounseled putative defendant, no waiver of any kind is required, much less a voluntary, knowing and intelligent waiver. Respondent submits that if the power of the prosecutor, through the grand jury, to gather his evidence from the mouth of the accused in the form of sworn testimony, compelled by subpoena and backed up by the power of

contempt, is to be sanctioned at all by this Court, then a strict waiver requirement is the very minimum safeguard necessary to guarantee that an uncounseled putative defendant who elects to testify does so with a meaningful understanding of the consequences of giving up his constitutional rights.

Although the Due Process Clause was not expressly relied on by the Court of Appeals in suppressing respondent's grand jury testimony, the Government has also argued that the practice of subpoenaing uncounseled putative defendants to the grand jury and interrogating them under oath without telling them anything at all about their Fifth Amendment rights, much less the fact that they may be indicted by that very grand jury, does not offend due process. Respondent argues in Part II, *infra*, that even if such procedures do not offend the prosecutor's sense of fair play, they are offensive to any less parochial standard of due process. The Government's position is especially curious since apparently government attorneys conducting federal grand juries routinely administer warnings to those witnesses whom they consider to be targets of the grand jury. Pet. Br. 19. Thus, the only substantial interest the Government seems to be asserting here is the right to decide for itself which uncounseled target witnesses it will warn and which ones it will require to fend for themselves. In any event, respondent contends that the Constitution, as interpreted by this Court, has dictated the terms under which the prosecutor may gather his evidence from the mouth of the accused, and those terms do not include keeping the accused in the dark about his most vital constitutional rights.

Finally, under an analysis premised on either the Self-Incrimination Clause or the Due Process Clause, acceptance of respondent's position will not, as petitioner contends, seriously impede the effective functioning of the grand jury or deprive the grand jury of

evidence obtainable only from persons who may themselves be involved in or at the fringes of crime. If a target witness truly wants to testify, with full appreciation of the consequences, presumably he would not be deterred by even the most elaborate Fifth Amendment advice. Obviously, informing people of their constitutional rights will lead, in some cases, to the exercise of those rights. But even in such cases the prosecutor and the grand jury are not without their resources. If, after being advised of his rights, a target witness indicates an unwillingness to testify, the Government can still obtain whatever information the witness might have about others involved in criminal enterprise. Congress has provided for precisely this situation by authorizing the Government to grant compulsory immunity to the witness, after which his testimony is properly compellable. 18 U.S.C. §6002, *et seq.* Moreover, even after a grant of immunity the Government can still seek to prosecute the witness himself, since this Court has held that the "use and derivative use" immunity conferred by 18 U.S.C. §6002 is a constitutionally adequate substitute for the privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). Thus, to the extent that the grand jury must rely on witnesses who are themselves involved in crime but who are needed by the grand jury because of the information they may have about others, the grand jury will not, as a result of a decision in this case adverse to the Government, be deprived of this source of evidence.

In sum, the only testimony the Government will lose as a result of a decision favorable to respondent in this case is compelled testimony from uncounseled putative defendants who would not testify if they understood both that they did not have to testify and the reasons why they might intelligently decide not to testify. Respondent submits, however, that such testimony is at the very core of the Fifth Amendment protection and

it is testimony which, in our accusatorial system, was never intended to be made compellable by the power of the Government.

ARGUMENT

I.

THE GOVERNMENT VIOLATED RESPONDENT'S RIGHT AGAINST SELF-INCRIMINATION WHEN IT KNOWINGLY COMPELLED HIM TO GIVE SELF-INCRIMINATORY TESTIMONY BEFORE THE GRAND JURY CONSIDERING WHETHER TO INDICT HIM WITHOUT FIRST OBTAINING FROM HIM A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THAT RIGHT.

The respondent in this case was subpoenaed to the grand jury and interrogated there under oath for the sole purpose of determining whether, after hearing his testimony, the grand jury would indict him for the substantive offenses about which he testified. Prior to his grand jury appearance, Mr. Washington was suspected by both the police and the prosecutor of having been involved in the theft of a stolen motorcycle that was discovered in his van, which was occupied at the time by two friends of Mr. Washington but not by him. Knowing that Mr. Washington was likely to incriminate himself if he testified and that the grand jury would then decide whether to indict him based on that testimony, the prosecutor subpoenaed him to the grand jury which was then investigating the case. Mr. Washington appeared without counsel, was placed under oath and answered the prosecutor's questions before the grand jury. He was subsequently indicted by that grand jury

for grand larceny and receiving stolen property. The question presented by this case is whether under these circumstances Mr. Washington was compelled to incriminate himself within the meaning of the Fifth Amendment; if so, this Court has consistently held that the Government may not use his compelled grand jury testimony at trial unless it can satisfy a heavy burden of demonstrating that, prior to testifying under compulsion, he voluntarily, knowingly and intelligently waived his Fifth Amendment rights.[2]

Beginning from the premise that a witness must ordinarily claim the privilege at the time he makes disclosures to the Government or he will not later be held to have been "compelled" to incriminate himself within the meaning of the Fifth Amendment, the Government argues that it may freely use respondent's grand jury testimony against him at trial (presumably in its case-in-chief) because respondent, who appeared at the grand jury without counsel, did not claim the privilege before testifying.[3] According to the Government, the principles of *Miranda v. Arizona*, 384 U.S. 436 (1966), which require law enforcement authorities to obtain from a suspect in custody a knowing and intelligent waiver of Fifth Amendment rights before they may

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[2] A similar question was presented last term in *United States v. Mandujano*, 425 U.S. ——, 96 S.Ct. 1768 (1976). The respondent in that case, however, sought to suppress his allegedly false grand jury testimony in a prosecution for perjury, and all eight Justices participating in the decision agreed that whatever Fifth Amendment rights the respondent had at the time of his appearance before the grand jury, the Constitution did not require suppression of his allegedly false testimony in a prosecution for perjury based on that testimony. Although six Justices joined opinions which addressed the question presented by this case in *dictum*, there was no opinion for a majority of the Court on that question.

[3] The government also argues that it does not violate the Due Process Clause to subpoena a target witness and interrogate him under oath at the grand jury without telling him that he is a target of the grand jury. The due process aspects of this case are discussed in Part II, *infra*, p. 42.

interrogate him, do not apply to interrogation of suspects before the grand jury pursuant to subpoena for two reasons: (1) interrogation before the grand jury is not as coercive as custodial interrogation by the police; and (2) to the extent that such interrogation is coercive, it is no more coercive of "target witnesses" or "putative defendants" than it is of ordinary witnesses whom the Government does not suspect of any criminal involvement.[4]

Respondent submits that the correct analysis, which answers dispositively all of the Government's arguments, was spelled out by this Court last term in *Garner v. United States, supra. Garner* elucidates the distinction – which runs through all of this Court's Fifth Amendment decisions – between governmental compulsion to disclose information and governmental compulsion to incriminate oneself. Where mere disclosure of information is involved, persons who feel they are incriminated by the disclosure must notify the Government by claiming the privilege or they will not later be held to have been "compelled" to incrimate themselves within the meaning of the Fifth Amendment. But where the Government compels disclosures from a witness who it knows will incriminate himself by making such disclosures, the Government is already on notice that its processes are compelling self-incrimination and the burden rests on the Government to demonstrate a valid

[4] The problem of how to define a "target witness" or "putative defendant" is not present here, since respondent was, by any definition, a target of the grand jury which indicted him. As the ensuing discussion in text will show, however, the concept is self-defined by the proper analysis; when the government knowingly seeks by compulsion to obtain self-incriminating testimony, the witness against whom such compulsion is exerted is entitled to the full protection of the Fifth Amendment, including the requirement that, absent a grant of immunity, he must validly waive the privilege before he may be compelled to make incriminating disclosures. Like petitioner, but for somewhat different reasons, respondent uses the terms "target witness," "putative defendant" and "potential defendant" interchangeably throughout this brief. See note 37, *infra*.

waiver of the privilege before it can use the compelled disclosures against the defendant at trial. As this Court explained in *Garner*, in order to find a violation of the Fifth Amendment privilege there must be not only governmental compulsion to disclose information, but the compulsion must be knowingly directed at a particular suspect or class of suspects to disclose self-incriminating information; if both of these elements coexist, as they plainly do in this case, the Government may not use the compelled disclosures against the defendant at trial absent proof of a valid waiver by the defendant prior to making the disclosures.

A. When The Government Uses The Compulsion Of A Judicial Subpoena And The Threat Of Contempt To Obtain Self-Incriminating Testimony From An Uncounseled Witness Whom The Grand Jury Is Considering Indicting And Who The Government Knows In Advance Is Likely To Incriminate Himself By Giving Such Testimony, It Has "Compelled" That Witness To Incriminate Himself Within The Meaning Of The Fifth Amendment.

The petitioner in *Garner v. United States, supra,* claimed that the prosecution should not have been permitted to use against him at his criminal trial on gambling charges certain disclosures he was "compelled" to make on his Form 1040 income tax returns, which all taxpayers are required to file. The Government argued that because Garner had filed the tax returns without asserting his privilege, he had not been compelled to incriminate himself within the meaning of the Fifth Amendment. This Court's starting point was the proposition that persons who file their income tax returns are not "volunteers"; though they may claim the privilege with respect to specific disclosures, they may

not refuse to file altogether and then defend against a resulting criminal prosecution on Fifth Amendment grounds. *United States v. Sullivan*, 272 U.S. 259 (1927). Thus Garner was compelled to file the returns containing the disclosures which the Government ultimately used against him at his criminal trial.

The Court next addressed the Government's principal contention that by failing to claim the privilege at the time he filed his returns, Garner had lost the benefit of the privilege.[5] It is at this point that the Court set forth the analysis which controls this case:

> These decisions stand for the proposition that, *in the ordinary case*, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not "compelled" him to incriminate himself.
>
> > "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of

[5] The Court initially made it clear that, despite some ambiguous language in some of the older cases, the mere failure to claim the privilege does not operate as a waiver; if incriminating testimony is compelled within the meaning of the Fifth Amendment, only a voluntary, knowing and intelligent waiver will suffice as proof that the privilege was in fact waived.

> This conclusion has not always been couched in the language used here. Some cases have indicated that a nonclaiming witness has "waived" the privilege, see, *e.g., United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927). Others have indicated that such a witness testifies "voluntarily," see *e.g., Rogers v. United States*, 340 U.S. at 371. Neither usage seems analytically sound. The cases do not apply a "waiver" standard as that term was used in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and we recently have made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222-227, 235-240, 246-247 (1973). Moreover, it seems desirable to reserve the term "waiver" in these cases for the process by which one affirmatively renounces the protection of the privilege, see, *e.g., Smith v. United States*, 337 U.S. 137, 150 (1949). 424 U.S. at 654 n. 9.

> the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States v. Monia, supra*, 317 U.S. at 427 (footnote omitted).

In their insistence upon a claim of privilege, *Kordel* and the older witness cases reflect an appropriate accommodation of the Fifth Amendment privilege and the generally applicable principle that governments have the right to everyone's testimony . . . . Despite its cherished position, the Fifth Amendment addresses only a relatively narrow scope of inquiries. *Unless the Government seeks testimony that will subject its maker to criminal liability*, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a *noncriminal* investigation of himself . . . . Unless a witness objects a government *ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating.* Only the witness knows whether the *apparently innocent* disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not compelled.

In addition, the rule that a witness must claim the privilege is consistent with the fundamental purpose of the Fifth Amendment – the preservation of an adversary system of criminal justice . . . . *That system is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures.* In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of

> adversary criminal proceedings. 424 U.S. at 654-656 (emphasis added; footnote and citations omitted).

Given the general rule that a witness must ordinarily claim the privilege or he will not be held to have been "compelled" to incriminate himself, the Court held that Garner's failure to claim the privilege at the time he filed his tax returns was fatal to his argument. Along the way, the Court rejected Garner's contention that the waiver requirement of *Miranda* should be applied to his case so as to prevent the Government from using the disclosures on his tax returns against him at trial absent a showing that he had knowingly and intelligently waived his privilege. In rejecting this contention, the Court observed:

> It is evident that these [coerced confession] cases have little to do with disclosures on a tax return. The coerced confession cases present the entirely different situation of custodial interrogation . . . . It is presumed that without proper safeguards the circumstances of custodial interrogation deny an individual the ability freely to choose to remain silent . . . . At the same time, *the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought. Thus, any pressures inherent in custodial interrogation are compulsions to incriminate, not merely compulsions to make unprivileged disclosures.* Because of the danger that custodial interrogation posed to the adversary system favored by the privilege, the Court in *Miranda* was impelled to adopt the extraordinary safeguard of excluding statements made without a knowing and intelligent waiver of the privilege. 424 U.S. at 657 (emphasis added; citations omitted).

Respondent submits that the Court's analysis in *Garner* controls this case; interrogation of uncounseled

target witnesses under oath before the grand jury pursuant to subpoena is not "the ordinary case." Here, unlike in *Garner*, the "inquiring government" uses its compulsory process to "seek[ ] testimony that will subject its maker to criminal liability." Here, unlike in *Garner*, the Government may not "assume that its compulsory processes are not eliciting testimony that [the target witness] deems to be incriminating," and the disclosures sought are not "apparently innocent" but are deliberately and specifically intended to provide a basis for determining whether a criminal prosecution should be initiated. By the same token, like the situation in *Miranda* but unlike *Garner*, "the inquiring government is acutely aware of the potentially incriminatory nature of the disclosures sought" and the compulsions of the judicial subpoena and the threat of contempt are "compulsions to incriminate and not merely compulsions to make unprivileged disclosures."

Properly understood, *Garner* reveals why this Court's decision last term in *Beckwith v. United States*, 425 U.S. 341 (1976), heavily relied on by the Government here, is consistent with respondent's position and is plainly distinguishable from this case. Before discussing *Beckwith*, however, it is necessary first to discuss briefly *Miranda* itself. As we shall show, this Court's analysis in *Garner* also reveals that, far from being an extension of the principles recognized in *Miranda*, respondent's position follows *a fortiori* from an application of those principles to the facts of this case.

Long before *Miranda*, it had been held that persons who were compelled by subpoena to testify in formal judicial or quasi-judicial proceedings were protected by the Fifth Amendment privilege. At least since *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), the Fifth Amendment privilege has been available to a witness who is brought to the grand jury by subpoena to testify there under oath and under the threat of contempt.

The threshold question presented in *Miranda* was whether the protections of the privilege applied *also* to custodial interrogation by the police, where there is no formal compulsion to testify.

In answering that question, the Court in *Miranda* traced the roots of the privilege against self-incrimination back to the oldest reported English cases. 384 U.S. at 458-466. The Court recognized that with the exception of some of the coerced confession cases,[6] the Fifth Amendment privilege had previously been held applicable exclusively in situations where there was some formal compulsion to testify. To determine whether the principles underlying the privilege apply as well to situations involving the "informal compulsion" to testify inherent in police questioning, the Court looked to the various techniques regularly employed by police and law enforcement authorities to obtain confessions, focusing not only on the use of actual force and violence which had in the past rendered certain confessions inadmissible under the Due Process Clause, but also on the more subtle forms of psychological coercion. 384 U.S. at 448-456. Examination of these coercive police tactics led the Court to conclude that "all the principles embodied in the privilege [against compelled self-incrimination] apply to informal compulsion exerted by law enforcement officers during in-custody questioning." 384 U.S. at 461. Building on this premise, the Court held that persons subjected to the "informal compulsion" of police custodial interrogation were entitled to the same Fifth Amendment protections

[6] *Bram v. United States*, 168 U.S. 532, 542 (1897). See also *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 347 (1963); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Powers v. United States*, 223 U.S. 303, 313 (1912). Although these cases suggested that coerced confessions are inadmissible because they violate the defendant's privilege against compelled self-incrimination, most of the cases which had held such confessions inadmissible had been decided under the Due Process Clauses of the Fifth and Fourteenth Amendments. The privilege against self-incrimination was not made applicable against the states until *Malloy v. Hogan*, 378 U.S. 1 (1964).

as persons subjected to the formal compulsion of a subpoena to testify under oath.

Where, as here, there is a formal compulsion to testify, however, the "informal compulsion" recognized in *Miranda* becomes irrelevant.[7] The question in the grand jury context, as *Garner* makes clear, is whether the compulsion is simply a compulsion directed at the general population to make disclosures or whether it is, instead, a compulsion to incriminate.

A related question was presented in *Miranda*. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), this Court had held that once a person has become the focus of a criminal investigation, he could not be interrogated by the police without the assistance and advice of his lawyer.[8] In *Miranda* two years later, the Court backed away somewhat from its total reliance on the "focus" rationale of *Escobedo*, and merged that concept into its definition of "custodial interrogation." Thus, in defining "custodial interrogation" as questioning which occurs "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, the *Miranda* court added "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on the accused." 384 U.S. at 444 and n. 4. Later in the *Miranda* opinion the

[7] The Court in *Garner* used the term "witness" to describe all those from whom the Government compels disclosures and defined the concept largely in terms of the formal compulsion to testify:

> The term "witness" is used herein to identify one who, at the time disclosures are sought from him, is not a defendant in a criminal proceeding. The more frequent situations in which a witness' disclosures are compelled, subject to Fifth Amendment rights, include testimony before a grand jury, in a civil or criminal case or proceeding, or before a legislative or administrative body possessing subpeona power. 424 U.S. at 652 n. 7.

[8] *Escobedo* relied primarily on the Sixth Amendment, but there were distinct Fifth Amendment overtones. 378 U.S. at 483, 485, 491. The Sixth Amendment rationale was not followed in *Miranda*, and the concept of a Sixth Amendment right to counsel prior to formal charges was rejected in *Kirby v. Illinois*, 406 U.S. 682 (1972).

Court was again careful to distinguish those persons who required special Fifth Amendment protections from those who did not, pointing out that "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." 384 U.S. 477-478.

What the Court held in *Miranda*, then, is that when the police are not engaged in "general questioning of citizens in the fact finding process" but are questioning suspects on whom a criminal investigation has focused, the interrogation may not go forward unless the suspect is fully advised of his Fifth Amendment rights, including a right to counsel incident thereto, and voluntarily, knowingly and intelligently waives those rights. The Court concluded that persons who are being questioned because they themselves are suspected of criminal involvement have a special need to be carefully advised of their Fifth Amendment rights; at the same time, the dictates of our adversary system of criminal justice demand of the interrogating government a special duty to provide such advice and to secure from the suspect a truly informed waiver of those rights before it may interrogate.

This Court's holding last term in *Beckwith v. United States, supra,* is not to the contrary. In that case this Court held that Beckwith was not entitled to the safeguards of the privilege erected in *Miranda* because it did not find "informal compulsion" in the non-custodial setting in which Beckwith was interrogated. There was little doubt that a criminal tax investigation had focused on Beckwith at the time he was interrogated, but he was not interrogated in custody – or anything resembling custody – and he was expressly told, in any event, that he did not have to answer the I.R.S. investigators' questions.

Beckwith clearly does not control this case, as petitioner contends. Pet. Br. 35. It is true that both respondent and Beckwith had become the focus of criminal investigations. Thus, in the words of the Court in *Garner,* "any compulsions were compulsions to incriminate, not merely compulsions to make unprivileged disclosures." 324 U.S. at 657. The difference between the two cases is that respondent was "compelled" and Beckwith was not.[9]

Garner is, in some respects, *Beckwith's* opposite. In *Garner* the compulsion was there in the duty to file income tax returns; but that was a duty imposed equally on all taxpayers and not just those who were suspected of criminal activity. Thus, there was no governmental compulsion operating on Garner to incriminate himself as an illegal gambler at the time he filed his tax returns; viewed another way, the focus of suspicion had not been cast on Garner at the time he was compelled to file his income tax returns, and accordingly, the values underlying our adversary system were in no way imperiled.[10]

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[9] *Beckwith* is further distinguishable from this case because the I.R.S. agents who questioned Beckwith in his home and office expressly advised him not only that he did not have to answer any incriminating questions and could speak to a lawyer before responding, but also that their purpose in questioning him was to inquire into possible *criminal* tax violations relating to his federal income tax liability for the years 1966 through 1971. Although this warning did not comply perfectly with *Miranda*, it provided Beckwith with a reasonably adequate basis on which to exercise intelligently his Fifth Amendment rights.

[10] The absence of any focus on Garner as an illegal gambler also distinguished that case (and *United States v. Sullivan, supra*) from the Court's earlier decisions in *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). The tax forms which the petitioners in those cases were prosecuted for refusing to file were required only of those engaged in illegal gambling activities. The mere filing of the required forms would have incriminated the petitioners, as would any requirement of a contemporaneous claim of the privilege as a basis for refusing to file. Thus, those petitioners were "compelled" to incriminate themselves in a way that Garner was not, and their failure to claim the privilege was not a bar to their later assertion of the privilege as a defense to a criminal prosecution for failing to file the required forms.

Reading *Miranda*, *Garner* and *Beckwith* together, the rule of law which governs this case clearly emerges: when the Government seeks to avoid the burdens of the adversary system by compelling self-incriminating disclosures (either formally, as in this case, or "informally," as in *Miranda*) from a person who it knows will incriminate himself by making such disclosures, it may not use those disclosures (or evidence derived therefrom) in evidence against the defendant at his criminal trial unless it can satisfy a heavy burden of demonstrating that the defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights before being subjected to the compulsion which gave rise to the disclosure. If there is governmental compulsion to disclose, but it is not compulsion to self-incriminate, the rule does not apply. *Garner v. United States, supra.* Likewise, if the Government seeks incriminating disclosures from a suspect or class of suspects but does not use compulsion to extract such disclosures, the rule also does not apply. *Beckwith v. United States, supra.* But where, as here, the Government uses the compulsion of the judicial subpoena to obtain from an uncounseled "putative defendant's" own mouth the incriminating evidence to be used to indict and prosecute him, the rule must apply with full force. "[A] defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecutor could have required him to give evidence against himself before a grand jury." *Michigan v. Tucker,* 417 U.S. 433, 441 (1974). If the right of the Government to build its case by compelling its evidence from the mouth of the accused is to be sanctioned at all by this Court, the adversary system and the values reflected by the Fifth Amendment privilege require nothing less than proof of a voluntary, knowing and intelligent waiver before the Government may use such evidence against the defendant at trial.

From what has already been said, the Government's two principal contentions can be disposed of rather quickly. Petitioner argues first, as it did in *Mandujano*, that the Fifth Amendment principles enunciated in *Miranda* have no application to grand jury target witnesses because interrogation before the grand jury is not as coercive as custodial interrogation by the police. But, as has been shown, the question of whether the police station is more or less coercive than the grand jury – a matter on which there is much room for disagreement[11]

[11] Whether interrogation under oath before the grand jury is in fact less intimidating or coercive than custodial interrogation by the police seems speculative at best. Anyone who has appeared as a witness pursuant to the command of a subpoena, sworn an oath to tell the truth and been subjected to cross-examination would have difficulty accepting the Government's assertion as empirical fact. The grand jury is, after all, an exceedingly private affair. The grand jury for the Superior Court for the District of Columbia meets in the bowels of the courthouse, just off the boiler room. Aside from the witness, who usually sits isolated in a chair which serves as a make-shift witness stand, the only persons in the grand jury room are a court reporter, a prosecutor, and between sixteen and twenty-three grand jurors who, at least in the case of target witnesses, sit at once as both triers of fact and potential accusers. The target witness subpoenaed to testify and interrogated under oath is unlikely to find this a particularly friendly audience. Indeed, in this very case, the trial court and the Court of Appeals suppressed respondent's grand jury testimony in part because he was advised of his Fifth Amendment rights for the first time *inside* the grand jury room. Both courts concluded that the atmosphere inside the grand jury room was not conducive to a truly voluntary waiver of the privilege, since claiming the privilege, in front of the grand jurors, would have run the risk that they would infer his guilt solely from his refusal to testify. See discussion *infra*, pp. 36-41.

Moreover, in *Miranda* itself the Court was careful to define "custodial interrogation" each time as questioning by the authorities initiated "after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444, 477, 478. While the grand jury subpoena may not be an arrest or a seizure within the meaning of the Fourth Amendment, *United States v. Dionisio, supra,* 410 U.S. at 10, there can be no doubt that the subpoenaed witness is deprived of his freedom in a significant way. In the case of an ordinary grand jury witness, this fact alone may not be sufficient to justify or require Fifth Amendment safeguards. But when the witness is a target of the grand jury and thus the very purpose of the grand jury's interrogation is to extract from the witness enough inculpatory testimony to form the basis for an indictment, the compulsion of the subpoena and the duty to obey it carry with them the need for zealous protection of the witness' Fifth Amendment rights.

– is completely irrelevant to a finding of compelled self-incrimination in the grand jury context. The coercive interrogation techniques discussed at length in the *Miranda* opinion were not the *sina qua non* for a finding of Fifth Amendment compulsion that petitioner would make them, but were necessary in that case, where there was no formal compulsion to testify, only to get the Court to the point where it begins in this one. Unlike suspects interrogated by the police, putative defendants interrogated under oath before the grand jury pursuant to subpoena are, in the truest sense, exposed to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 55 (1964).[12] See also, *Michigan v. Tucker, supra,* 417 U.S. at 445. Thus, the significance of *Miranda* for this case is not the extension of the Fifth Amendment privilege into the police station – the issue

[12]Indeed, virtually all the values reflected in the Fifth Amendment privilege identified by the Court in *Murphy v. Waterfront Comm'n, supra,* are present when the Government uses the compulsion of a judicial subpoena to obtain self-incriminatory testimony from a putative defendant before the grand jury:

> The privilege against self-incrimination "registers an important advance in the development of our liberty–'one of the great landmarks in man's struggle to make himself civilized.' " *Ullmann v. United States*, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162. *Murphy v. Waterfront Comm'n.*, 378 U.S. at 55 (footnote omitted).

which divided the Court[13] – but the requirement that statements obtained from an uncounseled suspect under compulsion to respond are inadmissible against him at trial unless, prior to making such statements, the suspect was fully advised of his Fifth Amendment rights and voluntarily, knowingly and intelligently waived them.

This Court's analysis in *Garner* also answers dispositively the Government's other main contention that "a witness's answers before the grand jury are no more likely to be compelled (in a constitutionally significant sense) if he is suspected of involvement in criminal activity of the sort the grand jury is investigating than if he is not." Pet. Br. 22, 28. While is is true that the compulsion of the subpoena and the threat of contempt operates on both target and non-target witnesses, it is not true that the status of the witness has no constitutional significance. With respect to ordinary witnesses, the inquiring Government is not knowingly and intentionally *seeking* incriminating disclosures. For all the Government knows, such witnesses are wholly innocent of any criminal conduct, and the burden rests fairly with the witness to apprise the Government of any claim that the "apparently innocent disclosure" he is being asked to make will incriminate him. Thus, respondent does not contend that the Constitution requires the Government to advise *all* grand jury witnesses of their rights before taking their testimony or that *ordinary* witnesses who make incriminating

[13]The dissents in *Miranda* objected strenuously to the extension of the privilege into the police station, but all of the dissenting Justices recognized the applicability of the privilege to the grand jury, where the formal compulsion of the subpoena and the oath have traditionally been held to "compel" testimony within the meaning of the Fifth Amendment. 384 U.S. at 510 (Harlan, J., dissenting); 384 U.S. at 526-527 (White, J., dissenting). See also *Michigan v. Tucker, supra,* 417 U.S. at 439-443; *Kastigar v. United States, supra,* 406 U.S. at 443-445.

disclosures but who fail to claim the privilege before testifying have been compelled to incriminate themselves within the meaning of the Fifth Amendment.

But, as we have already shown and as this Court recognized in *Garner*, target witnesses are different. As to them, the compulsion to disclose information operates as a compulsion to incriminate, and the Government knows full well that the disclosures it is compelling will incriminate the witness. Indeed, in many cases the very purpose of subpoenaing the target witness to the grand jury is to obtain from his own mouth the incriminating evidence necessary to indict and prosecute him. Such witnesses are "compelled" in a "constitutionally significant sense," and the values reflected in the Fifth Amendment which undergird our adversary system require proof of a voluntary, knowing and intelligent waiver before the Government may use against the accused at trial his own grand jury testimony taken at a time when the accused was not represented by counsel and was himself the target of the grand jury's investigation.

B. As Two Lower Courts Have Held, Respondent Did Not Validly Waive His Fifth Amendment Privilege Because He Was Not Adequately Advised Of His Rights Prior To His Appearance Before The Grand Jury And Because He Was Never Told, At Any Time, That The Prosecutor And The Grand Jury Had Focused On Him As A Target For Indictment.

Respondent Washington was subpoenaed by the Government to appear and give testimony before the grand jury so that the grand jury could decide, after hearing his testimony, whether he should be indicted and prosecuted for the theft of a stolen motorcycle

that was discovered in his van. Yet he was never advised, either by the prosecutor who issued him the subpoena or by the prosecutor conducting the grand jury, that he was a suspect or that he might be indicted if he answered the grand jury's questions. Nor was he told that he should (or might wish to) consult with a lawyer prior to his grand jury appearance.

Respondent appeared at the grand jury as ordered by the subpoena. Because he is legally indigent, he did not have a lawyer. The prosecutor conducting the grand jury had reviewed the case and had concluded that the grand jury might well disbelieve respondent's innocent explanation of the presence of the motorcycle in his van and indict him. (A. 57-58). Nevertheless, the prosecutor did not advise respondent of his Fifth Amendment rights prior to taking him inside the grand jury room and swearing him as a witness. Once he was in front of the grand jury and sworn as a witness, respondent was given a modified version of the so-called "*Miranda* warnings" from the form used by the local police officers for advising people whom they arrest. (A. 51, 62). However, instead of advising respondent that he was "under arrest," as printed on the form, the prosecutor told him "You are not under arrest. You're just here by way of subpoena." (A. 3).

The prosecutor then informed respondent that he had a right to a lawyer and a right to remain silent and that anything he said could be used against him "in court." (A. 4). At no time, however, either before being sworn or in the grand jury room itself, was he advised that he was a target for indictment or that anything he said could be used against him "in the grand jury." Nor did anyone tell respondent what a grand jury was, what the purpose of the grand jury's questions was or that there was a substantial possibility that the grand jury would, based on his own testimony, indict him in

connection with the stolen mototcycle.[14] Respondent acknowledged the warnings and proceeded to testify. He was subsequently indicted for grand larceny and receiving stolen property.

Having shown in Part IA, *supra*, that under this Court's decisions respondent was under compulsion to incriminate himself within the meaning of the Fifth Amendment, the only remaining question is whether respondent validly waived his Fifth Amendment rights when he testified at the grand jury without claiming the privilege. This Court has repeatedly held that the Fifth Amendment privilege is so fundamental to our adversary system and so inextricably bound up with the package of constitutional rights intended to provide the

[14] In *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964) (*en banc*), the District of Columbia Circuit was faced with a question similar to the question presented by this case. In holding that the warnings given to the defendant in that case were not adequate to protect his Fifth Amendment rights, the Court said:

> No one told him, before he was taken to the grand jury, what a grand jury was or what his rights before it would be, although the committing magistrate and the police had told him in general terms that he need not "incriminate himself."
>
> * * *
>
> When Short was actually facing the grand jury it was too late for any warning to mean much. The warning the prosecutor gave him in the grand jury room would have been inadequate to protect his rights even if Short's presence had been voluntary. *The prosecutor told him he was "before the Grand Jury" but did not tell him on what business the grand jury was engaged. The prosecutor told him he need not answer questions and that answers could be used against him "at any future trial," but did not tell him the grand jury would use his answers to decide whether to indict him.* 342 F.2d at 869-870 (emphasis added).

The above quotation is from the four-judge plurality opinion in *Jones*. The other two judges in the six-judge majority agreed that taking the defendant before the grand jury and interrogating him under oath without counsel showed an extraordinary disregard of the defendant's "situation" and "customary practice," but did not agree with the other four judges in the majority that automatic dismissal of the indictment was necessarily required as a matter of constitutional law. 342 F.2d at 873 n. 18. See also *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955).

accused with a fair trial that only a voluntary, knowing and intelligent waiver will suffice as proof that the accused willingly gave up his right to silence. *Garner v. United States, supra*, 424 U.S. at 654 n.9; *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-246 (1973); *Miranda v. Arizona, supra*, 384 U.S. at 475-476. The standard had its genesis in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), where the Court held that the purported waiver (of counsel in that case) must manifest "an intentional relinquishment or abandonment of a *known* right or privilege." (emphasis added).

In suppressing respondent's grand jury testimony, two lower courts have held that under this standard respondent did not validly waive his Fifth Amendment privilege and attendant right to counsel prior to testifying at the grand jury because he was never told, and presumably did not know, that he was himself a potential defendant who might be indicted by the very grand jury whose questions he was answering. Both lower courts also expressed the view that the giving of such advice as was given only after respondent was already sworn and face to face with the grand jurors further undermined the validity of any purported waiver. (Pet. App. 3a; A. 70-71). Respondent submits that the decision of the Court of Appeals on this point (and that of the Superior Court) was correct and should be affirmed; the Government can not meet its "heavy burden" of demonstrating a valid waiver (*Miranda v. Arizona, supra*, 384 U.S. at 475) on a record which

plainly shows that the advice it gave respondent was the wrong advice, in the wrong place at the wrong time.[15]

1. With respect to the validity of a purported waiver in the absence of advice to the subpoenaed witness that he is a target for indictment by the very grand jury before which he is ordered to appear, petitioner frames the question as whether "the Self-Incrimination Clause [can] reasonably be held to require a 'putative defendant' warning on top of full *Miranda* warnings (or any warnings regarding the privilege)." Pet. Br. 39. Respondent submits that petitioner has turned the relevant question upside down. The real question is whether an uncounseled target witness who is told that he has a right not to answer questions can possibly exercise that right intelligently if he is not told any basis on which he might decide that it makes sense for him not to answer certain questions.

In the context of custodial interrogation by the police, the first warning a suspect is given is that he is under arrest or, if he has not been formally arrested, that he is under suspicion in connection with the

[15]Because petitioner does not accept the proposition that *any* waiver was required, it analyzes the Court of Appeals' decision on the failure to give a "target witness warning" and the failure to advise respondent of his rights out of the presence of the grand jury as if the Court of Appeals has held that these were independent constitutional entitlements, each being required by the Fifth Amendment. Having created this strawman, petitioner then proceeds to knock it down by arguing that the Constitution "does not require 'target' warnings or 'potential defendant' warnings" (Pet. Br. 38) and that "the Constitution . . . does not forbid the administration [of any required warnings] in the presence of the grand jury." Pet. Br. 53-54. What the Court of Appeals held, of course, was *not* that any specific warnings, or timing and location of any warnings, is itself required by the Constitution, but that any purported waiver of the Fifth Amendment privilege (which the Constitution does require) is not valid unless it is voluntarily, knowingly and intelligently made. The Court of Appeals (and the Superior Court) could not conclude that the Government had met its heavy burden of establishing such a waiver on the facts of this case.

investigation of a particular offense.[16] This is the threshold information without which the remaining warnings would become little more than an empty ritual. It tells the suspect that he has something to worry about, so that when he is told immediately thereafter that he does not have to answer questions and that he can talk with a lawyer before deciding whether to answer questions, he understands why he might wish to invoke one or the other of those rights. By the same token, if the suspect decides to make a clean breast of things or to attempt to exculpate himself, he does so with a full appreciation of the consequences.

Obviously, the precise advice that fulfills this threshold requirement in the context of custodial interrogation would make no sense at all when a suspect is being interrogated before the grand jury. He can not be told that he is "under arrest," nor is it adequate to advise him that he is under suspicion by the police. Thus, the requisite advice must be adapted to fit the situation in which it is given. It is not that any specific set of warnings is required by the Constitution; it is that the advice given must be adequate to serve the constitutional purpose for which it is intended – that purpose being to insure that any decision by the suspect to exercise or waive his Fifth Amendment privilege be made knowingly and intelligently.

Before the grand jury, the target witness who appears without counsel may have no idea what the grand jury is investigating or the basis of its interest in him. If he has committed a crime, he may know the extent of his own criminal involvement (although an uncounseled

[16]As noted, the first warning on the P.D. 47, used by police officers in the District of Columbia and borrowed by the prosecutor in this case to advise respondent at the grand jury, advises the suspect that "You are under arrest." (A. 51-52, 61-62).

witness may not even be aware of that), but he ordinarily has no way of knowing that it is *his* criminal involvement, and not the criminality of others, on which the grand jury has focused its investigation. On the other hand, he may not be guilty of any crime, and the prosecution may be silently building its case against him out of his own mouth without his even being aware that he is incriminating himself.[17] If such a witness is not told expressly that the function of the grand jury is to indict persons who are to be criminally prosecuted and that the grand jury has focused on him as a potential target for indictment, it is simply unrealistic to suggest that an *uncounseled* target witness can make "knowing" and "intelligent" decisions with respect to the exercise of his privilege.[18] The so-called "target witness warning" cannot be viewed as simply another layer "on top of full *Miranda* warnings," as

[17]As Mr. Justice Frankfurter, writing for the Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1956), observed:

> Time has not shown that protection from the evils against which [the Fifth Amendment privilege] was directed is needless or unwarranted. This Constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States. (Footnote omitted).

Later the same Term, in *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956), Mr. Justice Clark wrote for the Court:

> The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.

[18]This is especially true in respondent's case, where the prosecutor who subpoenaed him to the grand jury appears to have told him only that he was needed "as a witness" in the grand jury's investigation of respondent's two friends. (A. 45). See note 31, *infra*.

petitioner attempts to characterize it, but must be evaluated for what it really is – the essential advice without which any other advice becomes completely ineffectual.

Even assuming that some target witnesses subpoenaed to the grand jury do perceive that they are in jeopardy, that is not an argument against advising such witnesses that they are targeted for indictment. In the case of a witness who is fully knowledgeable of his potential criminal liability and the consequences of answering questions given that liability, it is perhaps true that any advice, including advice that he is a target for indictment, is probably superfluous.[19] But such advice, after all, is designed to inform the ignorant, not the sophisticated; any relaxation of the waiver requirement which would permit finding a valid waiver on the assumption that the target witness probably knew, without being informed, that he was the target of the grand jury, would make the full protection of the Fifth Amendment privilege available only to those who need it least – those who, based on prior experience or advice of counsel, know how and why to invoke it – and deny it to those, like respondent, who are compelled to testify before the grand jury seeking to

[19]The Government makes no claim that it would be overly burdensome to administer warnings to target witnesses. It would be hard pressed to make such an argument in any event. Petitioner concedes that "it is common practice for government attorneys to advise [target witnesses] of their Fifth Amendment privilege." Pet. Br. 19. Petitioner also correctly points out that the premise of the Second Circuit's supervisory holding in *United States v. Jacobs*, 531 F.2d 87 (1976), petition for a writ of certiorari pending, No. 75-1883, was the regular practice of federal prosecutors within that Circuit to give warnings, including "target witness" warnings, to all target witnesses. Moreover, a letter submitted to this Court by the Solicitor General in connection with its consideration of *United States v. Mandujano*, *supra*, indicates that as long ago as 1963 federal prosecutors were advised by the Justice Department to warn target witnesses whom they compelled by subpoena to appear before the grand jury. Respondent contends that such warnings are not simply a matter of prosecutorial largesse, but are the essential underpinnings of a voluntary, knowing and intelligent waiver.

indict them and who appear without counsel and with only the most rudimentary understanding of their rights and how (or why) to assert them.[20] As the Court said in *Miranda* in rejecting a similar contention that a court should be permitted to find a valid waiver based on a subjective judgment that a particular suspect who had not been warned was nevertheless aware of his Fifth Amendment rights:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. 384 U.S. at 468-469 (footnote omitted).

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[20]It is more than a coincidence that both Roy Mandujano and Gregory Washington were indigent criminal defendants who appeared before the grand jury without a lawyer and who, after being indicted by the grand jury based on their own testimony, were *then* given court-appointed counsel to represent them at trial. As this Court recognized in *Miranda*, it is almost always the indigent and the ignorant who most need assistance in understanding and intelligently exercising their Fifth Amendment rights. 384 U.S. at 472. If an affluent citizen were subpoenaed to the grand jury as a target witness, he would of course seek the advice of counsel and make a knowing and intelligent decision to assert or waive his right to silence. The Government suggests that "the recipient of a grand jury subpoena, unlike an arrestee, has an opportunity in advance of questioning to consult with counsel and friends and decide to what extent (if at all) he will respond to questioning" (Pet. Br. 25-26), but if he has no lawyer, and no money with which to afford one, this "opportunity" is of little comfort.

Finally, respondent's position is in accord with that taken by the American Bar Association. Standard 3.6(d) of the A.B.A. Standards for Criminal Justice, *The Prosecution Function* (Approved Draft, 1971), states:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury *without informing him that he may be charged and that he should seek independent legal advice concerning his rights.* (emphasis added).

The commentary to standard 3.6 states that this warning is required by "due regard for the privilege against self-incrimination and the right to counsel."[21] Under this Court's decisions, if a putative defendant is under governmental compulsion to incriminate himself, "due regard for the privilege" can mean nothing less than a voluntary, knowing and intelligent waiver of the Fifth Amendment privilege. In concluding that such a waiver had not been demonstrated on this record, the Court of Appeals and the Superior Court were clearly correct in focusing on the fact that respondent was never informed that he was the target of the grand jury which had subpoenaed his testimony.

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[21]Referring to its brief in *Mandujano* at 37-39, petitioner argues here that there is "no Sixth Amendment right to counsel in grand jury proceedings." Pet. Br. 39 n. 16. For this proposition, petitioner relies primarily on *Kirby v. Illinois*, *supra*, which holds that the Sixth Amendment right to counsel does not attach until the formal commencement of a criminal prosecution. But the question is not whether a putative defendant compelled to testify before the grand jury has a right to counsel under the Sixth Amendment; as in *Miranda*, the advice of counsel is essential to protect his Fifth Amendment privilege. And this Court expressly held in *Kirby*, *supra*, that nothing in that case affected the continuing of the vitality of the right to counsel associated with the Fifth Amendment privilege recognized in *Miranda*. 406 U.S. at 687-688. In any event, because respondent was advised, once he was inside the grand jury room, that he could have a lawyer outside the grand jury room, the question of respondent's right to counsel, *vel non*, and the source and scope of any right to counsel, is not squarely presented by this case. See note 28, *infra*.

2. Respondent submits that the two lower courts were also correct in emphasizing that the prosecutor's failure to advise respondent of *any* rights until he was sworn as a witness in front of the grand jury, was another important factor supporting their conclusion that no voluntary, knowing and intelligent waiver had been demonstrated. At that moment, respondent was on the witness stand in a room where the only other people were a court reporter, a prosecutor and the grand jurors who were to be, at one and the same time, his triers of fact and his potential accusers. One can hardly imagine an atmosphere less conducive to a voluntary, knowing and intelligent decision about whether to answer questions or invoke a right not to answer. Yet it was in this environment that respondent was told, for the first time, that he did not have to testify and was then asked whether, in spite of his right to silence, he was willing to answer the prosecutor's questions. Respondent was thus placed in a completely untenable position. If he chose to testify, he ran the risk that the grand jurors would not believe his explanation and indict him (assuming for the moment he knew, without having been told, that he was a target for indictment); if he chose to exercise his privilege and remain silent, he ran the risk that the grand jurors would draw an inevitable but impermissible inference of his guilt merely from his exercise of his constitutional privilege not to testify. It is hardly surprising that both lower courts were unwilling to accept respondent's decision to testify under these circumstances as proof of a truly voluntary waiver of the privilege.

Advising a witness of his privilege for the first time inside the grand jury room not only vitiates the voluntariness of any resulting waiver, it also runs afoul of an independent Fifth Amendment doctrine. It has long been held that the Government may not, directly or indirectly, exact any price for the exercise of the

privilege which makes its assertion costly. Although this principle has been articulated differently and has been recognized in a variety of different contexts,[22] the most closely analogous application is the rule that the prosecutor may not comment on or make evidentiary use of the defendant's decision not to testify at trial or at some earlier stage of the proceedings at which he was privileged to remain silent. *Griffin v. California*, 380 U.S. 609, 614 (1965); *Grunewald v. United States*, 353 U.S. 391 (1957); *Stewart v. United States*, 366 U.S. 1 (1961); *cf. Miranda v. Arizona, supra*, 384 U.S. at 468 n.37; *United States v. Hale*, 422 U.S. 171 (1975); *Doyle v. Ohio*, ____ U.S. ____, 96 S.Ct. 2240 (1976); *compare Raffel v. United States*, 271 U.S. 494 (1926).[23] If the prosecutor waits until the target

[22] *See e.g., Garrity v. New Jersey*, 385 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *compare Baxter v. Palmigiano*, ____ U.S. ____, 96 S.Ct. 1551 (1976) (distinguishing this line of decisions on the ground that the prison disciplinary action was not based solely on the prisoners' refusal to answer questions). See also *Slochower v. Board of Education*, 350 U.S. 551, 557-558 (1956), which was decided under the Due Process Clause before *Malloy v. Hogan, supra*, made the Self-Incrimination Clause applicable against the states.

The Court's analysis in *Garrity v. New Jersey, supra*, is especially pertinent here. In that case the summoned police officers, most of whom were represented by counsel, did not assert their privilege and chose instead to answer official questions under a threat of dismissal from the police force if they exercised their right to refuse to answer. The State sought to use the resulting disclosures against the officers in a subsequent criminal prosecution. It was argued by the State that the failure to claim the privilege at the time of the questioning constituted a waiver. The Court rejected that contention outright, concluding that any purported waiver made in consequence of a threat of dismissal could not be considered voluntary. 385 U.S. at 498-499.

[23] Admittedly, some of these decisions—particularly *Grunewald*, *Stewart* and *Hale*—were supervisory. But this Court has never indicated that the fundamental principle epitomized by *Griffin v. California, supra*, 380 U.S. at 614, and *Grunewald v. United States, supra*, 353 U.S. at 425-426 (Black, J., concurring), is of less than constitutional magnitude. Furthermore, it seems clear that this Court does have supervisory authority over the local Article 1 courts of the District of Columbia, and particularly over grand juries of those courts that are conducted by and under the supervision of federal prosecutors. Cf. *Griffin v. United States*, 336 U.S. 705 (1949); *Fisher v. United States*, 328 U.S. 463 (1946).

witness is in front of the grand jury before asking him whether he wishes to assert his privilege or to answer the grand jury's questions, the target witness electing to exercise his privilege will have no choice but to do so in front of the very grand jury that is considering whether he should be indicted. And if a grand jury considering whether to indict a putative defendant can use against him the fact that he refused to testify before that grand jury, an exceedingly high price will have been placed on the exercise of the privilege. An inference of guilt by the grand jury and a resulting indictment would seem to be directly analogous to the situation where the inference is drawn by the petit jury and a criminal conviction results so as to bring this case within the rationale of the line of decisions headed by *Griffin*. Just as the Fifth Amendment would forbid a prosecutor from forcing a defendant at trial to take the stand solely for the purpose of having him refuse to testify in front of the jury, so too – and for the same reason – a prosecutor should not be permitted to put a putative defendant before the grand jury solely for the purpose of having the grand jury, if he exercises his privilege, hear his refusal to testify and use it against him in deciding whether or not to indict him.[24]

[24]If the prosecutor were to call to the stand at trial a witness *other than* the defendant, knowing the witness is likely to assert a testimonial privilege which will reflect adversely on the defendant in the eyes of the jury, the constitutional implications, *vel non*, and the appropriateness or adequacy of any purportedly remedial judicial instructions are less clear. See *Namet v. United States*, 373 U.S. 179 (1963). In the context of this case, however, it would not only be the potential defendant himself whose claim of privilege would be turned against him, but any adverse inference would be drawn by the grand jury out of the presence of any court and in the absence of a lawyer representing the defendant. Accordingly, there would be no way of guaranteeing any effective curative instructions designed to prevent the grand jury from using against a target witness an inference from his exercise of the privilege. Moreover, since courts will not generally look behind an indictment to see what evidence was presented to the grand jury, a reviewing court will not be in a position to guage the extent to which any inference from the defendant's refusal to testify influenced the grand jury's decision to indict. See *United States v. Calandra*, 414 U.S. 338, 344-345 (1974).

The obvious way to avoid these consequences and, at the same time, to insure that a putative defendant subpoenaed to the grand jury is given a full opportunity to exercise the privilege freely and without fear of adverse inferences is to require the Government to advise the putative defendant of his rights *before* he enters the grand jury and is sworn as a witness.[25] If he decides not to answer incriminating questions, or if he asks for an opportunity to consult with counsel before deciding whether or not to testify, he should not be called as a witness and the grand jury should not be advised that he was subpoenaed but exercised his right not to testify.[26] If, on the other hand, the target witness or putative defendant choses to waive his privilege and to answer the prosecutor's questions in front of the grand jury, a reviewing court could be more confident in concluding that the resulting waiver was voluntarily, knowingly and intelligently made.[27]

[25]Assistant United States Attorney Shine, who interrogated respondent before the grand jury, testified below that because of the risk that the grand jury will draw an improper inference, his routine practice, from which he deviated in this case only out of apparent inadvertence or for reasons of convenience, "is to talk to him in my office and advise him of his rights and if he decides that he is not going to testify, then I don't put him in front of the Grand Jury." (A. 59, 63-64).

[26]In some circumstances, for example where the grand jury is already aware that a putative defendant has been subpoenaed, it might be necessary to devise a prophylactic rule requiring the prosecutor to tell the grand jury that he advised the witness of his rights and the witness elected not to testify and to further instruct the grand jurors that they are to draw no inference of guilt against the putative defendant from his exercise of the privilege.

[27]The prosecutor could protect himself and his evidence by having the witness execute a written waiver of the privilege which could be included in the record. Moreover, where the target witness does elect to waive the privilege and testify, nothing would prevent the prosecutor from readvising the witness of his Fifth Amendment rights and establishing the waiver on the record after the witness is called before the grand jury and sworn. This would further strengthen the prosecutor's hand against any later claim by the defendant that the waiver was coerced by the prosecutor in the confines of his office.

Once again, the American Bar Association Standards relating to the Prosecution Function are in accord with respondent's position. Standard 3.6(e) states:

> The prosecutor should not compel the appearance of a witness [before the grand jury] whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his constitutional privilege not to testify.

The commentary to Standard 3.6 explains that this provision is necessary because "it would dilute and infringe upon the privilege against self-incrimination to require a potential defendant to appear before a grand jury and there claim the privilege when the prosecutor has been told in advance that the witness would do so. Such a tactic is unfair in that the very exercise of the privilege may prejudice the witness in the eyes of the grand jury." Although Standard 3.6(e) does not explicitly state that the warnings required by 3.6(d) must be given out of the presence of the grand jury, that requirement would seem to be implicit in the stated rationale for Standard 3.6(e). Indeed, the two Standards together would have little impact if the requirement to warn the putative defendant and the requirement to protect him from any adverse inference by the grand jurors arising out of his claim of privilege could be easily circumvented by the simple expedient of delaying the warnings until the putative defendant was before the grand jury.

Whether or not advising the target witness outside the presence of the grand jury should always be required as an essential prerequisite of an effective waiver, the Court of Appeals and the Superior Court were clearly correct in viewing the time and place of the advice given to respondent as one factor to be considered in determining whether his purported waiver was voluntary, knowing and intelligent. Adding these factors together, including the failure to advise respondent that the grand jury had

focused on him as a potential target for indictment, the holding of the Court of Appeals (and the Superior Court) that respondent's uncounseled decision to answer the grand jury's questions did not measure up to the constitutional standard for a valid waiver was a sound one and should not be reversed.[28]

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[28] Because respondent was advised, once he was inside the grand jury, that he had a "right to remain silent" and a right to an appointed lawyer "outside the Grand Jury room" while he testified (A. 3-4), this case does not squarely present the question of whether those rights or those warnings are essential to a knowing and intelligent waiver of the Fifth Amendment privilege. Respondent would point out, however, that although the grand jury generally has a right to everyman's testimony (*Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)) and although ordinary witnesses have a corresponding duty to answer the grand jury's questions unless they reasonably fear such answers may tend to incriminate them, putative defendants, for the reasons we have shown, are different. With respect to someone who is the target of the grand jury, virtually all of the grand jury's questions are incriminating–indeed, their purpose is to incriminate–and it would seem that only an absolute right to silence would adequately protect the privilege in this context, at least absent a showing by the Government to a supervising court that the witness' claim of privilege with respect to certain questions was overbroad. Moreoever, a defendant's absolute right to remain silent at trial "might be practically nullified" (*Michigan v. Tucker, supra*, 417 U.S. at 441) if the privilege were not given a coextensive scope when the defendant is compelled to testify as a "putative" defendant before the grand jury.

This Court has not defined the extent to which a putative defendant has a "right to counsel" before the grand jury, nor has it clarified the source of any such right. Presumably, under *Kirby v. Illinois, supra*, the putative defendant would not have a right to counsel derived from the Sixth Amendment because a criminal prosecution would not have been formally initiated, although, as in this case, if an uncounseled putative defendant is compelled to incriminate himself before the grand jury, criminal prosecution will not be far behind. Quite apart from the Sixth Amendment, however, the Court made it clear in *Kirby* that the Fifth Amendment privilege was not implicated in that case, and it expressly reaffirmed the right to counsel associated with the Fifth Amendment recognized in *Miranda*. 406 U.S. at 687-688. Moreover, the scope of any right to counsel is necessarily related to the scope accorded to the privilege. If putative defendants compelled to testify under oath before the grand jury are not protected by a right to silence, but have only the right to refuse to answer specific questions which they feel will tend to incriminate them, then the need for the guiding hand of counsel is particularly acute. As this Court said in *Maness v. Meyers*, 419 U.S. 449, 468-469 (1975):

(continued)

II.

COMPELLING A TARGET WITNESS TO APPEAR BEFORE THE GRAND JURY AND INTERROGATING HIM THERE UNDER OATH WITHOUT INFORMING HIM THAT THE GRAND JURY HAS FOCUSED ON HIM AS A TARGET FOR INDICTMENT AND MAY, IF HE TESTIFIES, USE HIS OWN TESTIMONY AS A BASIS FOR INDICTING HIM VIOLATES THE DUE PROCESS CLAUSE.

In refusing to allow the Government to use respondent's own grand jury testimony against him at his criminal trial, the Court of Appeals based its decision on the Self Incrimination Clause and the cases decided thereunder and did not rely on the Due Process Clause. Respondent believes, however, that either clause provides this Court with an adequate ground for

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(footnote continued from preceding page)

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.
>
> * * *
>
> The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced. That decision is, and should be, for the witness. But, if his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege.

If the risk of contempt for erroneous advice may prevent a lawyer from providing a witness with requisite advice regarding his Fifth Amendment privilege, then not having a lawyer at all poses an even greater threat to the free and intelligent exercise of the privilege. At the very least, it would seem that indigent putative defendants who are subpoenaed to testify before the grand jury should have a right to consult with a lawyer before they are required to exercise or waive their Fifth Amendment privilege and should be advised that they have such a right.

decision; indeed, regardless of the stated rationale, it seems clear that most courts which have faced the question presented by this case have been struck by the patent unfairness of subpoenaing a witness whom the grand jury is likely to indict and interrogating him under oath before that very grand jury without telling him even that he is a potential target for indictment.[29]

The unfairness of not advising a target witness that he is a potential defendant would be especially harsh if this Court were to accept petitioner's argument that even a grand jury target witness is not "compelled" to incriminate himself within the meaning of the Fifth Amendment unless he asserts his privilege and is somehow forced to testify despite his expressed desire to remain silent. If an uncounseled target witness' failure to claim the privilege at the grand jury were automatically to disqualify him from later interposing a Fifth Amendment objection to the Government's use against him at trial of testimony he gave at the grand jury under the compulsion of a subpoena, the Due Process Clause should be held to require, at the very least, advising the target witness at the grand jury that he may be indicted by that grand jury, that he therefore has a right to refuse to answer the grand jury's questions and that if he answers questions

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[29] Petitioner suggests that respondent's contention is that the mere calling of potential defendants to testify before the grand jury creates the unfairness giving rise to the due process violation (Pet. Br. 42), but that is not respondent's contention. This Court appears to have held that potential defendants may be called to testify before the grand jury. *United States v. Dionisio, supra*, 410 U.S. at 10 n. 8 (1973). What is unfair is compelling such persons to appear and testify without counsel and without telling them they are potential defendants who might, for that reason, legitimately wish to refuse to testify on Fifth Amendment grounds.

without asserting that right he will not later be heard to claim that his Fifth Amendment rights were violated.[30]

The situation here is thus almost the converse of *Doyle v. Ohio*, ____ U.S. ____, 96 S.Ct. 2240 (1976), and the considerations of fundamental fairness in both cases compel the same result. In *Doyle* this Court held that the Due Process Clause is violated when a criminal defendant is told by the police that he has a right to remain silent and the Government later attempts to impeach his purportedly exculpatory trial testimony with the fact that he remained silent when questioned about the same matters by the police. Here the Government claims the right to use the defendant's own grand jury testimony against him at trial (presumably in its case-in-chief) because, according to the Government, his failure to invoke the privilege when he was questioned at the grand jury as a target witness pursuant to subpoena means that he was not "compelled" within the meaning of the Fifth Amendment. Yet respondent was never told at the grand jury the basis on which he might intelligently chose to exercise the privilege, much less the fact that a failure to claim it would operate as a permanent bar to its

[30]The Government argues–somewhat disengenuously, we submit–that "even a witness [who] is a prime target . . . may wish to confess his part in the offense" and suggests that there is nothing "fundamentally unfair for the Government to have summoned and questioned the witness without giving a 'putative defendant' or 'target' warning." Pet. Br. 44. The short answer to this contention is that those who truly want to confess would not be deterred by simple warnings, would freely execute a valid waiver and would not later complain of unfairness. Accordingly, in such cases neither the due process nor the self-incrimination issue would arise. Cf. *Garrity v. New Jersey*, *supra*, 385 U.S. at 499.

later assertion.[31] Nor did respondent have the benefit of counsel to explain to him at the grand jury the nature of the privilege or the consequences of a failure to exercise it.

The fact that respondent appeared at the grand jury without counsel and the fact that he was never told that the reason he was subpoenaed was to enable the grand jury to decide, after hearing his testimony, whether or not to indict him are, of course, critical to the resolution of due process questions presented by this case. In *United States v. Kordel*, 397 U.S. 1 (1970), along with their Fifth Amendment self-incrimination claim, the respondents also argued that the procedure whereby the Government had obtained from them in a civil proceeding information which it later used against them in a criminal prosecution violated their right to due process. In rejecting this argument, Mr. Justice Stewart, writing for the Court, noted:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal

[31]Although respondent does not contend that he was deliberately misled into believing that he was *not* a target of the grand jury, under the circumstances he might reasonably have believed that he was not. Respondent knew that his two friends had been arrested and were under investigation by the grand jury. The prosecutor who handed respondent the grand jury subpoena testified that he thought he recalled telling respondent "that he would be needed *as a witness* [in the grand jury's investigation of the other two men] and I would give him a subpoena." (Emphasis added) (A. 45). And, once respondent was inside the grand jury room and sworn as a witness, the prosecutor conducting the grand jury assured him that "You are not under arrest. You're *just* here by way of subpoena." (Emphasis added) (A. 3). It is submitted that what he should have said was "You are not under arrest. You should understand, however, that this grand jury's job is to decide whether you should be indicted for stealing the motorcycle found in your van, and if you are indicted you will be prosecuted for that offense."

> prosecution; nor with a case where the defendant is without counsel . . . 397 U.S. at 11-12 (footnotes omitted).

In contrast to *Kordel*, each of the enumerated due process factors is present here: the sole purpose of putting respondent before the grand jury was to determine whether, after hearing his testimony, the grand jury would indict him and, if so, to obtain evidence that the Government would seek to use in the resulting criminal prosecution (A. 48, 57-58); respondent was never told that the Government or the grand jury was contemplating indicting and prosecuting him; and respondent appeared at the grand jury without counsel and answered the grand jury's questions without the advice of counsel.[32]

Finally, if the Government's broadest position here and in *Mandujano* were to find acceptance, the due process considerations would be even more compelling. Although respondent was advised, at least by the time he was in front of the grand jury, that he had a right to refuse to answer the grand jury's questions and a right to consult with counsel, the Government has argued here and in *Mandujano* that he was not even entitled to

[32]The presence of counsel in *Kordel* was also highly relevant to the Court's disposition of the self-incrimination question presented by that case. As this Court noted in *Garner v. United States*, *supra*, 424 U.S. at 653, *Kordel* is the only case which actually holds that a witness must ordinarily claim the privilege before "testifying" or he will be barred from later asserting it. In reaching that result, however, the Court was careful to point out that "[t]he respondents do not suggest that [the witness], who answered the interrogatories on behalf of the corporation [without asserting the privilege], did so while unrepresented by counsel or without appreciation of the possible consequences." 397 U.S. at 10. It is one thing to require a knowledgeable witness with legal counsel to claim the privilege or forego it; it is another matter to impose such burdens on indigent putative defendants who respond dutifully to grand jury subpoenas without the benefit of counsel. It is significant that, like the witness in *Kordel*, none of the other witnesses in the line of cases headed by *United States v. Monia*, 317 U.S. 424 (1943), including Monia himself, were uncounseled indigents. See note 20, *supra*.

that much. According to the Government, target witnesses or putative defendants are entitled to no advice whatever; they can be subpoenaed to the grand jury and interrogated under oath without counsel and without being told either that they may be indicted by that grand jury or that they have a constitutional right not to answer the grand jury's incriminating questions. While conceding that such witnesses have an absolute right to refuse to answer each and every one of the grand jury's questions relating to their possible criminal activities, the Government would apparently prefer to be able to interrogate uncounseled target witnesses at the grand jury under the compulsion of a subpoena without telling them anything at all about their constitutional rights.[33] Neither the adversary system nor the Due Process Clause will tolerate such patently unfair practices on the part of the Government.

[33]As mentioned earlier (note 19, *supra*), Government attorneys conducting federal grand juries apparently make it a practice to administer warnings to witnesses whom they consider to be targets of the grand jury. Thus, the only substantial interest the Government seems to be asserting here (and in *Mandujano*) is the right to decide for itself which uncounseled target witnesses it will warn and which ones it will require to fend for themselves. Respondent's position, of course, is that the Constitution, as interpreted by this Court, has wisely taken that power out of the prosecutor's hands.

III.

ACCEPTANCE OF RESPONDENT'S POSITION WILL NOT SERIOUSLY IMPEDE THE EFFECTIVE FUNCTIONING OF THE GRAND JURY, WHICH ALREADY HAS AMPLE MEANS OF SECURING NECESSARY TESTIMONY FROM RELUCTANT WITNESSES, INCLUDING, MOST NOTABLY, THE AVAILABILITY OF "USE" IMMUNITY AUTHORIZED BY 18 U.S.C. 6002, *ET SEQ.*

This is not a case in which the needs of law enforcement and the interests protected by the Fifth Amendment can not be harmonized. Under an analysis premised either on the Due Process Clause or the Self-Incrimination Clause, acceptance of respondent's position will not seriously impede the effective functioning of the grand jury or deprive the grand jury of evidence obtainable only from persons who may themselves be involved in or at the fringes of crime.

As if to acknowledge that its legal arguments are on shaky ground, petitioner accents its brief with familiar policy arguments suggesting that if this Court imposes a requirement that target witnesses be advised, prior to testifying, that they are targets of the grand jury and that they have a right not to answer incriminating questions, grand juries will be deprived of evidence essential to their task and, because crime will therefore go undetected or unprosecuted, society will be the worse for it. Thus, the Government sounds at the outset the theme that is to be replayed many times throughout its brief:

> It is common to call as grand jury witnesses individuals who are known or suspected to be involved in or at the fringes of the criminal activity under investigation (such persons are, after all, likely to be in the best position to supply relevant evidence); it is also common in the case of most such witnesses, for a variety of reasons, that there is no intent to prosecute, particularly if they are cooperative with the grand jury. The effective functioning of the grand jury would be seriously impeded by requiring administration of warnings designed to inhibit the testimonial cooperation of such witnesses. Pet. Br. 13-14.

These arguments from necessity are not new, nor are they totally without merit. All law-abiding citizens have a stake in the effective functioning of the grand jury in the ongoing battle against crime. The short answer to these considerations, however, was provided in *Miranda* itself, 384 U.S. at 479.

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e.g.*, *Chambers v. Florida*, 309 U.S. 227, 240-241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

But there is another complete answer to petitioner's stated concerns. Petitioner paints a picture of target witnesses trooping into the grand jury, receiving advice as to their Fifth Amendment rights and refusing to testify, thereby depriving the grand jury of essential information, including information about others in-

volved in criminal activities.[34] What petitioner fails to mention, however, is that Congress, in response to this very problem, has provided the complete solution in 18 U.S.C. §6002, *et seq.*[35] Thus, even if petitioner were correct that providing Fifth Amendment advice would inhibit target witnesses from cooperating with the grand jury, the grand jury is not forced simply to shrug its shoulders and make do without such testimony; the prosecutor need only apply to a judge for an order pursuant to 18 U.S.C. §6003, after which the testimony of the witness is properly compellable subject to the use immunity provision of 18 U.S.C. §6002. Moreover, even if the Government decides to prosecute the witness, its original decision to grant the witness

[34] The assumption that any target witness who is informed of his rights will elect not to testify may be slightly exaggerated. There is no reason not to assume that at least some target witnesses, after being given adequate Fifth Amendment advice, would execute perfectly valid waivers of their Fifth Amendment rights. In such cases the Government will have lost nothing by giving the advice and will have insulated the resulting testimony from subsequent Fifth Amendment challenges. More importantly, however, what the Government's policy argument really boils down to is the complaint that if it has to tell uncounseled target witnesses what their constitutional rights are, some of those witnesses are going to exercise those rights. It seems to respondent that there could hardly be a more compelling argument in favor of a means for assuring that target witnesses who elect to waive their Fifth Amendment privilege do so with a meaningful understanding of what they are giving up.

[35] In tracing the history of this statute and its predecessors in *Kastigar v. United States, supra,* 406 U.S. at 445-447, the Court made several observations which are pertinent to petitioner's arguments here.

> Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with [the values which underlie the Fifth Amendment privilege]. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses, and their primary use has been to investigate such offenses (footnotes omitted).

See also *Lefkowitz v. Turley, supra,* 414 U.S. at 78-79, 81-82.

immunity would not be a bar to subsequent prosecution either for the substantive offenses about which he testified or other offenses.[36] This Court has held that the "use and derivative use" immunity conferred under 18 U.S.C. §6002 is coextensive with scope of the privilege against self-incrimination. *Kastigar v. United States, supra,* 406 U.S. 441. Thus, the Government would merely have to demonstrate in any subsequent prosecution that its case was not built on the testimony (or the fruits of the testimony) compelled pursuant to the grant of immunity, but rested instead on a wholly independent foundation. *Id.* at 460; *Murphy v. Waterfront Comm'n, supra,* 378 U.S. at 79 n.18; see *United States v. DeDiego,* 511 F.2d 818 (D.C. Cir. 1975).

The ready availability of statutory immunity is such an obvious solution to the Government's stated concerns, one suspects that losing the testimony of target witnesses about *others* involved in crime is not the Government's real concern.[37] If what the Government is really worried about is losing the compelled self-incriminating testimony of uncounseled target witnesses – testimony which it is now able to get from target witnesses who are ignorant of their rights – there can be only one response; the Government seeks precisely what the Fifth Amendment protects.

[36] Even after a grant of immunity pursuant to section 6002, the witness can, of course, be prosecuted for perjury if he lies to the grand jury. 18 U.S.C. §6002; 18 U.S.C. §1623. If, on the other hand, the witness continues to refuse to testify, he can be held in contempt. 18 U.S.C. §6002. See also, 18 U.S.C. §401; 28 U.S.C. §1826.

[37] The availability of immunity also exposes the weakness of the Government's so-called subjective test for determining who is a "putative defendant." The Government argues that if it must tell any witnesses what their Fifth Amendment rights are, it should only be those whom it subjectively intends to indict, and not those whose criminal involvement and potential self-incrimination are known to the Government, but who are not presently candidates for indictment and are needed by the grand jury solely to provide evidence against others. Pet. Br. 49-52. But since the Government can always immunize those witnesses whom it needs solely

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The Government cannot have it both ways. It cannot use the compulsion of a judicial subpoena to extract self-incriminating testimony from an uncounseled putative defendant without a grant of immunity and in violation of his Fifth Amendment rights and then use that testimony to indict and prosecute the putative defendant himself. Those are the terms dictated by our adversary system and by the Fifth Amendment privilege, which this Court has called "an important advance in the development of our liberty – 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956), quoting from Griswold, The Fifth Amendment Today (1955), 7.

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for the information they have about others, it has everything to gain and nothing to lose by properly advising all such witnesses of their Fifth Amendment rights. Respondent believes that the proper test is the one which emerges naturally from this Court's analysis in *Garner v. United States*, *supra*; when the Government uses compulsion to obtain self-incriminating testimony from those who it knows are likely to incriminate themselves by giving such testimony, it must first make sure that the targets of such compulsion understand that they have a right not to answer incriminating questions. In any event, as petitioner appears to concede (Pet. Br. 50 n. 23 and 51), respondent was a putative defendant under any test, and the desirability of one test or another in the abstract should have no bearing on the outcome of this case.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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